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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19478

LO-VACA GATHERING COMPANY,
HOUSTON PIPELINE COMPANY,
EL PASO NATURAL GAS COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Joint Petition for Review of Opinion and Order of Federal Power Commission

JOINT APPENDIX

To the United States Court of Appeals for the Fifth Circuit and the Honorable Judges Thereof:

Come now Lo-Vaca Gathering Company, Houston Pipe Line Company, and El Paso Natural Gas Company (herein collectively termed "Joint Petitioners") pursuant to Section 19(b) of the Natural Gas (Act)[1], 15 U.S.C. 717r(b),

[1] Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U.S.C. §§ 717-717w, inclusive. The specific sections of the Act which are cited in this petition are set forth *verbatim* in the appendix.

and file this joint petition for review of an opinion and order of the Federal Power Commission (Commission) issued October 23, 1961, in *Lo-Vaca Gathering Company, et al.* Docket Nos. CI60-693, *et al.* (Opinion No. 348). By this opinion and accompanying order the Commission determined certain proposed sales by Lo-Vaca Gathering Company (Lo-Vaca) and Houston Pipe Line Company (Houston) to the El Paso Natural Gas Company (El Paso) to be subject to its regulatory jurisdiction. Joint Petitioners are aggrieved by such determination and petition this Court to review and set aside the Commission's opinion and order. In support whereof, Joint Petitioners show as follows:

I

Parties

Lo-Vaca is a corporation organized and existing under the laws of the State of Texas, having its principal place of business at the Petroleum Tower, Corpus Christi, Texas. Lo-Vaca's activities, facilities, and sales are all within the State of Texas. Pertinent here, Lo-Vaca proposes to make two separate sales of natural gas to El Paso. Delivery will be made at Three Rivers, Texas, to El Paso's affiliate, El Paso Gas Supply Company.

Houston is a corporation organized and existing under the laws of the State of Texas, having its principal place of business at The Petroleum Building, Houston, Texas. Houston has for many years been engaged in the intrastate purchase, transportation, and sale of natural gas all within the State of Texas. The gas sold by it either to distribution companies or to industrial and commercial customers is all produced and consumed entirely within the State of Texas.

El Paso is a Delaware corporation with its principal place of business in El Paso, Texas. Among other opera-

tions, El Paso is engaged in transportation and sale of natural gas for resale in interstate commerce as well as the consumption of natural gas in its own facilities both within and outside the State of Texas. El Paso is a "natural-gas company" within the meaning of that term as defined by Section 2(6) of the Natural Gas Act.

Respondent is a Commission created and existing under the laws of the United States. Its membership is composed of Joseph C. Swidler, Chairman, Howard Morgan, Lawrence J. O'Connor, Jr., and Charles S. Ross.[2] These Commissioners are the duly-appointed, qualified, and acting members of the Commission. The Commission and its members are charged with the responsibility of administering the Natural Gas Act. The principal office of the Commission is at 441 G Street, N. W., Washington 25, D. C.

II

Statement of Jurisdiction and Venue

This petition for review is filed pursuant to the provisions of Section 19(b) of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U.S.C., § 717r(b), which provides in part, as follows:

> "(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of

[2] The Federal Power Act which established the Federal Power Commission provides for five Commissioners. (See, Act of June 10, 1920, c. 285, § 1, 41 Stat. 1063, as amended, 16 U.S.C. 792.) At the date of issuance of the opinion and order of which review is sought Jerome K. Kuykendall was a member of the Commission. Mr. Kuykendall resigned from the Commission effective January 1, 1962. Mr. Harold C. Woodward has been nominated to fill the vacancy.

business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

On June 1, 1960, Lo-Vaca filed an application for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Act seeking authorization, in accordance with a contract dated March 15, 1960, to gather and deliver to El Paso, at Three Rivers in Live Oak County, Texas, certain supplies of natural gas which it proposed to purchase in Live Oak, Goliad, Lovaca, and adjacent counties in Texas. Lo-Vaca did not seek certificate authority for the sale of these volumes. By the same application, Lo-Vaca also sought authorization, in accordance with a separate contract dated May 16, 1960, to deliver and sell to El Paso certain additional supplies which it proposed to purchase in the same producing area.

On December 27, 1960, Houston filed a petition requesting that the Commission enter an order declaring that neither it nor the sellers from whom it purchases gas would become natural gas companies subject to the jurisdiction of the Commission by reason of a sale of natural gas which it proposed to make to El Paso. Houston's sales contract provided that the gas which would be produced in Texas, purchased by Houston and delivered by it to El Paso at Three Rivers in Live Oak County, Texas, would be consumed wholly in Texas.

By order issued February 24, 1961, the Commission set these matters for consolidated hearing limiting the issues to be heard "to the question of the Commission's jurisdiction over the proposed sale of gas by Houston for use as fuel in El Paso's facilities in Texas and in Phillips' gaso-

line plant in Ector County, Texas, and over the proposed sale of gas by Lo-Vaca for use as fuel in El Paso's facilities outside Texas."

By order issued March 15, 1961, the Commission permitted El Paso, among others, to intervene as a party in the consolidated proceedings.

After due hearings the presiding examiner issued his initial decision on August 11, 1961, in which he concluded that the proposed sale by Houston would not be subject to the Commission's jurisdiction, but that the proposed sale by Lo-Vaca would be jurisdictional.

Subsequently, after the filing of exceptions, the Commission in its Opinion No. 348 issued October 23, 1961, modified the examiner's decision and determined that both the sale by Lo-Vaca and the sale by Houston would be subject to its jurisdiction as sales for resale in interstate commerce. Pursuant to Section 19(a) of the Act, each of the petitioners herein filed application for rehearing. And, on December 12, 1961, the Commission denied rehearing.

This joint petition for review is being filed within 60 days after the Commission's denial of rehearing. On these facts, jurisdiction and venue for purposes of review of the Commission's opinion and order issued October 23, 1961, are established in this Court by the provisions of Section 19(b) of the Act.

III

Commission Action of Which Review Is Sought

In its Opinion No. 348 issued on October 23, 1961, the Commission determined that the "sale and delivery of natural gas by Lo-Vaca and Houston * * * would result in Lo-Vaca and Houston being engaged in the transportation of natural gas in interstate commerce, and in the sale

in interstate commerce of such gas for resale, and Lo-Vaca and Houston thereby would become natural gas companies within the meaning of the Natural Gas Act, and their respective sales to El Paso would be subject to our jurisdiction." Accordingly, it denied Houston's petition for an order determining that neither Houston nor the sellers of gas to Houston would become natural gas companies subject to the Commission's jurisdiction by reason of the proposed sale by Houston to El Paso.

Both Lo-Vaca and Houston contend that their proposed sales to El Paso are not sales for resale in interstate commerce within the meaning of Section 1(b) of the Act. El Paso joins Lo-Vaca and Houston in these contentions.

Although the two proceedings of which review is sought were consolidated for hearing and decision and the statutory language to be applied in determining jurisdiction is the same, the facts of the Lo-Vaca sale in Docket No. CI60-693 are significantly different from the facts of the Houston sale in Docket No. CP61-177. In essence, Lo-Vaca proposes to make a sale of gas to be restricted to El Paso's own use outside the State of Texas. On the other hand, Houston would make a sale for resale, but all volumes delivered by Houston to El Paso would be restricted for use within the State of Texas.[3] But the two sales must be considered in the context of Section 1(b) of the Act which limits Commission jurisdiction over sales to those transactions which satisfy the dual requirements, namely, (1) that they must be sales in interstate commerce and (2) that they must be sales for resale. Thus, although Lo-Vaca's sale would be in interstate commerce, it would not be a sale for resale and hence would not fall within the

[3] A small portion of the gas to be sold by Houston to El Paso would be resold to Phillips Petroleum Company for use as fuel in the Phillips Goldsmith Plant in Ector County, Texas.

scope of Commission jurisdiction over sales under Section 1(b) of the Act. Thus. although Houston's sale would be a sale for resale, it would not be a sale in interstate commerce and again the jurisdictional prerequisites of Section 1(b) would not be met.

Because of the foregoing distinction between the two proposals, the facts of each sale are treated separately below:

Lo-Vaca's sale.

In its application in Docket No. CI60-693, Lo-Vaca requested a certificate of public convenience and necessity to authorize two proposed operations. First, under contract of March 15, 1960, herein referred to as Lo-Vaca's restricted-use contract, Lo-Vaca proposes to gather gas from certain producers and deliver 50,000 Mcf per day to El Paso at Three Rivers, Texas. From this point the gas would be transported by El Paso Gas Supply Company to El Paso's Sonora Plant, in Sutton County, Texas, where it would enter El Paso's system. Here the gas would be commingled with other supplies, some of which would be resold for consumption outside the State of Texas. Importantly, Lo-Vava did not seek authorization for the restricted-use sale, but only for the delivery of the restricted-use gas to El Paso. However, it is the sale of this restricted-use gas which the Commission has determined to be a sale for resale in interstate commerce, and this determination is the subject of Lo-Vaca's petition for review.

At this juncture an important difference between the Lo-Vaca and Houston proposals should be noted. Lo-Vaca requested certificate authority for delivery of its restricted-use gas to El Paso on the theory that the gas was destined for out-of-state consumption by El Paso. As such, this delivery is concededly transportation in interstate com-

merce subject to the Commission's jurisdiction under Section 1(b) of the Act. In contrast, however, Houston did not seek certificate authority for its delivery of gas to El Paso since, by contract, its gas would be destined for consumption within the State of Texas.

Secondly, Lo-Vaca sought authorization in Docket No. CI60-693 to deliver and sell an additional 80,000 Mcf of natural gas per day under a contract of May 16, 1960, herein referred to as Lo-Vaca's non-restricted use contract. No issue is before the Court concerning this sale.

The question presented by Lo-Vaca's petition is a narrow one. It relates solely to the jurisdictional status of the restricted-use sale. As noted previously, no question is raised with respect to the Commission's determination that the delivery of the gas by Lo-Vaca to El Paso would be transportation in interstate commerce and hence subject to the Commission's jurisdiction. The restricted-use contract provides, in part, as follows:

"ARTICLE XVI"
"use of Gas"

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

It is the contention of the Petitioners that this restricted-use sale to El Paso is not subject to Commission jurisdiction because it is not a sale for resale. It is a direct sale for El Paso's own us. The fact that the gas, which is a

fungible commodity, would be physically commingled with other gas in El Paso's system does not change the character of the transacation nor transform the direct sale into a sale for resale. Further, since this sale is the subject of a separate contract which does not include any gas for resale, the Commission's ability to maintain its jurisdiction over all sales for resale in interstate commerce is not jeopardized in any manner by its inability to regulate this sale.

Houston's sale.

In its Petition for a Declaratory Order to Remove uncertainty filed December 27, 1960, in Docket No. CP61-177, Houston detailed the facts of its proposed sale to El Paso. At the outset Houston noted that it had covenanted with the producers from whom it acquired gas not to introduce the gas into interstate commerce. Thus, a typicial restriction as set forth in the petition reads as follows:

> XVII. Sales by Buyer in Interstate Commerce.
>
> "17.1 Buyer [Houston] represents that Buyer has no present desire or intention that the gas delivered to Buyer by Seller hereunder be transported in interstate commerce or sold for resale in interstate commerce. If because of changed conditions which Buyer cannot now foresee, Buyer should desire to transport or sell gas delivered hereunder into interstate commerce, Buyer shall give Seller not less that sixty (60) days' prior written notice of its intention to sell or deliver any gas purchased hereunder for transportation, sale or resale in interstate commerce, as such term is defined in the Natural Gas Act (June 21, 1938, c. 556, Sec. 24, 52 Stat. 833, Ch. 1513, Title 15, U.S. C.A.), as heretofore or hereafter amended, or in substitute legislation covering the same or similar subject

matter, and notwithstanding any other provision hereof, Seller shall have and is hereby given the continuing right and option to cancel and terminate this contract at any time during the period of fifty-five (55) days next following the receipt by Seller of any such notice from Buyer by the giving of written notice of such cancellation and termination to Buyer within such period of time, but not thereafter."

Accordingly, in their contract of July 19, 1960, Houston and El Paso agreed that all gas would be "used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas". However, it was recognized that any gas purchased from Houston "for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system".

Pursuant to other contract terms, Houston agreed to deliver an average of 70,000 Mcf of natural gas per day to El Paso at Three Rivers, Texas. At this point El Paso, through its affiliate, El Paso Gas Supply Company, would accept delivery of gas and transport the volumes together with volumes to be received from Lo-Vaca, to El Paso's Sonora Plant in Sutton County, Texas, where the gas would enter El Paso's system and be commingled with additional volumes of gas destined for out-of-state consumption. However, the contract provides that a volume equal to, or in excess of, the volume delivered by Houston to El Paso, will, at all times, either be consumed by El Paso in its fuel consuming facilities within the State of Texas or will be delivered by El Paso to Phillips Petroleum Company for use at the latter's Goldsmith gasoline plant in Ector County, Texas.

With respect to Houston's sale, Petitioners contend that it is not subject to Commission jurisdiction because it is not a sale in interstate commerce. Since all gas would be consumed within the State of Texas where it would be produced, the sale would be made in intrastate commerce. Physical commingling of Houston's gas with other volumes in El Paso's system does not change the intrastate character of the sale. Like Lo-Vaca sale, Houston's contract involves the sale of a fungible commodity under a contract which relates only to gas which is not subject to Commission jurisdiction. The sale of this gas by Houston is under a contract which is wholly unrelated and entirely separate from any other gas purchase contract with respect to which Commission jurisdiction attaches and the Commission's inability to regulate Houston's sale would not jeopardize the ability to maintain its jurisdiction over all sales for resale in interstate commerce.

Commission Decision.

In its Opinion No. 348, the Commission decided that it would have jurisdiction over the sales by Lo-Vaca and by Houston. In a patently selective assertion of jurisdiction, its *ratio decidendi* appears to be that because of commingling the restricted-use gas would lose its legal identity; Lo-Vaca's direct sale would be transformed into a sale for resale, and Houston's sale in intrastate commerce would become a sale for resale in interstate commerce. Further, despite a disclaimer that it seeks to extend its jurisdiction beyond the limits of Section 1(b) of the Act, the Commission also claims authority over the sales by Lo-Vaca and Houston by reason of a purported effect of such sales upon other sales which are subject to its regulatory control. In reaching its decision, the Commission departed from numerous established court precedents including, *United States v. Public Utilities Commission of California*, 345 U.S. 295

(1953); *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947); *People's Natural Gas Company* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550 (1926); *North Dakota* v. *Federal Power Commission*, 247 F. 2d 173 (8th Cir. 1957); *City of Hastings* v. *Federal Power Commission*, 221 F. 2d 31 (C.A.D.C. 1954); *Federal Tender Board No. 1* v. *Haynes Oil Corporation*, 80 F. 2d 468 (5th Cir. 1935).

IV

Grounds Upon Which Relief Is Sought

Joint Petitioners contend that the Commission's determination that their proposed sales to El Paso would be sales for resale in interstate commerce is contrary to law. Joint Petitioners further contend that the Commission's determination that Lo-Vaca and Houston would become natural-gas companies within the meaning of that term as used in the Natural Gas Act by reason of their proposed sales is likewise contrary to law. Being aggrieved by such determinations, Joint Petitioners urge that the Commission committed error in the following respects:

(1) In determining Lo-Vaca's proposed sale of natural gas restricted to El Paso's own use would be a sale for resale in interstate commerce;

(2) In failing to conclude that Lo-Vaca's proposed sale to El Paso would be a direct-use sale and hence not subject to the Commission's jurisdiction;

(3) In determining Houston's sale of natural gas restricted to consumption in the State of Texas would be a sale for resale in interstate commerce;

(4) In failing to conclude that Houston's proposed sale to El Paso would be a sale in intrastate commerce and hence not subject to the Commission's jurisdiction;

(5) In failing to conclude that Lo-Vaca would require a certificate of public convenience and necessity only for the delivery but not for the sale of its restricted-use gas to El Paso; and

(6) In failing to conclude that Houston would not require a certificate of public convenience and necessity to make its proposed restricted-use sale to El Paso.

V

Relief Prayed

Wherefore, for all the foregoing reasons, Joint Petitioners pray:

(1) That the Clerk of this Court serve a copy of this Joint Petition upon the Respondent, Federal Power Commission, at its official address at 441 G Street, N. W., Washington 25, D. C.;

(2) That this Court direct the Commission to file with the Clerk of this Court the official transcript of the record in the proceedings here sought to be reviewed;

(3) That this Court review the Commission's Opinion No. 348 and accompanying order issued October 23, 1961, and upon such review, to take the following action;

(a) reverse and set aside said Opinion and order;

(b) determine and declare that the restricted-use sale proposed by Lo-Vaca would not be a sale for resale in interstate commerce, and that the restricted-use sale proposed by Houston would not be a sale in interstate commerce;

(c) determine and declare that the restricted-use sales proposed by Lo-Vaca and Houston would not be subject to the jurisdiction of the Commission; and

(d) determine and declare that Lo-Vaca and Houston would not become natural-gas companies within the meaning of the Natural Gas Act by reason of their proposed restricted-use sales to El Paso; and

(4) That this Court exercise jurisdiction over the parties and subject matter of this Joint Petition and grant to the Petitioners such other and further relief in the premises as the rights and equities of the cause may require.

Respectfully submitted,

LO-VACA GATHERING COMPANY
HOUSTON PIPE LINE COMPANY
EL PASO NATURAL GAS COMPANY
By /s/ BRADFORD ROSS
Bradford Ross
Ross, Marsh & Foster
725-15th Street, N. W.
Washington 5, D. C.

February 6, 1962

APPENDIX

[Public—No. 688—75th Congress]
[Chapter 556—3d Session]
[H. R. 6586]

Section 1. (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or

gatering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

• • • • • • • • • • •

Sec. 2. When used in this act, unless the context otherwise requires—

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

• • • • • • • • • • •

Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construtcion or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

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Sec. 7. (c) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public con-

venience and necessity may require: [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

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Sec. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, States, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

Sec. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Com-

mission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

BEFORE THE FEDERAL POWER COMMISSION

Docket No. C160-693

In the Matters of:
LO-VACA GATHERING COMPANY

Docket No. CP61-177

HOUSTON PIPE LINE COMPANY

Hearing Room D
Federal Power Commission
441 G Street, Northwest
Washington, D. C.

Tuesday, March 21, 1961

The above-entitled matters came on for hearing, pursuant to notice, at 10 o'clock a.m.

BEFORE:

Robert E. Freer, Presiding Examiner.

* * * * * * * * * * *

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Jack Ware

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ross:

Q. Mr. Ware, will you please state your full name and address? A. My name is Jack Ware. My address is 200 Petroleum Tower, Corpus Christi, Texas.

Q. Will you state whether or not you are employed by

Lo-Vaca Gathering Company? A. Yes, sir, I am, as vice president.

Q. Are you familiar with the application for a certificate of public convenience and necessity which was filed by Lo-Vaca Gathering Company with the Federal Power Commission at Docket No. CI60-693? A. I am.

Q. I want to be sure I have the right number. That is correct. A. Yes, I am familiar with that.

Q. Are the facts therein alleged true and correct to

the best of your knowledge? A. They are.

Q. The contracts that are attached to that certificate application are for the sale and delivery of gas to El Paso Natural Gas Company; is that correct? A. Yes, sir.

Q. There are two contracts and I wonder if you would tell us the dates at which they were executed? A. The contract calling for the delivery of 50 million for use by El Paso within its own system was executed in March. The other contract, the one that has no restrictions on it—March 15th to be exact is the date of the first one. The second one, the one without any restrictions as to use by El Paso is dated the 16th day of May, 1960.

Q. And referring to the contract dated March 15, 1960, does that provide a restriction with regard to the use to be made of the gas by El Paso? A. Yes, sir, it does. It is set out in Article 16 at page 22 under the heading "Use of Gas," and in that article it says that all of the gas purchased by El Paso is to be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas.

Q. Is there any such restriction in the contract dated May 16, 1960?

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A. No, sir, there is not.

Mr. Ross: At this point, I ask Your Honor that there be marked for identification as Item A by reference, the application and attachments filed by Lo-Vaca in this proceeding.

Presiding Examiner: It may be so marked for identification.

(The documents above referred to were marked for identification, Item A, by reference)

By Mr. Ross:

Q. Mr. Ware, are you familiar with the letter dated November 25, 1960, addressed to Honorable Joseph H. Gutride, Secretary of the Federal Power Commission, which was signed by Bradford Ross as attorney for Lo-Vaca Gathering Company? A. Yes, sir, I am.

Q. Does that letter state the position of Lo-Vaca Gathering Company in this proceeding in response to an inquiry made by the Federal Power Commission of El Paso Natural Gas Company? A. Yes, sir, it does.

Mr. Ross: This is a very short letter, Your Honor, and I would like to ask the witness to just read the letter into the record.

The Witness: The letter is addressed to Honorable

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Joseph H. Gutride.

(The letter referred to is as follows:)

(23)

Law Offices of
Ross, Marsh & Foster
725 Fifteenth Street
Washington 5, D. C.

November 25, 1960

Honorable Joseph H. Gutride
Secretary
Federal Power Commission
Washington 25, D. C.

Re: Lo-Vaca Gathering Company

Docket No. CI60-693

Dear Mr. Gutride:

This responds to your letter of October 19, 1960, to El Paso Gas Supply Company, Docket No. CP60-101, with copy to Lo-Vaca Gathering Company, which letter requested a statement of Lo-Vaca's position regarding Commission jurisdiction over Lo-Vaca in this proceeding.

As is shown by its application dated June 1, 1960, Lo-Vaca Gathering Company proposes to make two sales to El Paso Natural Gas Company (El Paso) pursuant to the terms of agreements dated March 15, 1960 and May 16, 1960, copies of which were attached to the application.

The gas purchase agreement dated May 16, 1960, contains no restrictions upon the use of the gas by the buyer; it is a sale for resale in interstate commerce within the Commission's

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jurisdiction under section 1(b) of the Natural Gas Act. The gas purchase agreement dated March 15, 1960, contains, in Article XVI, a provision stating that all of the

gas to be purchased by El Paso from Lo-Vaca under this contract shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the state of Texas. This latter transaction is thus other than a sale for resale under section 1(b) of the Natural Gas Act and therefore is not subject to the Commission's jurisdiction.

Regardless of whether or not the Commission has jurisdiction Lo-Vaca intends to deliver the contractual volumes under both of its contracts with El Paso, reserving, however, its right to contest any Commission determination with respect to jurisdiction or any other matter in this proceeding.

Very truly yours,

LO-VACA GATHERING COMPANY
By Bradford Ross
Its Attorney

Presiding Examiner: The date of that?
The Witness: Is November 25, 1960.

By Mr. Ross:

Q. Mr. Ware, did you participate in the negotiations of the two contracts with El Paso Natural Gas Company?

A. Yes, sir, I did.

Q. Were those negotiations undertaken separately for each of those contracts? A. Yes, sir. The negotiations were commenced on the contract that was consummated and signed the 15th of March, along in the month of February, preceding February of 1960, and consummated in a contract, as I said, signed on the 15th of March.

Then, at some time later than February, in fact, I believe it was about the time that the March 15th contract

was actually executed, negotiations were commenced on the contract that was finally executed in May.

Q. Is it true that the gas which is being sold to El Paso Natural Gas Company will in fact be delivered to El Paso Gas Supply Company, a subsidiary of El Paso Natural Gas Company? A. That is my understanding of it, yes, sir.

Q. And can you state whether or not the deliveries of the gas under these two contracts will be separately metered? A. It will be separately metered, yes, sir.

Q. And will you state whether or not the gas which is going to be delivered to El Paso Gas Supply Company by Lo-Vaca with all be purchased or produced in the State of Texas?

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A. Yes, sir, it will.

Q. None of the gas will come from outside of the State of Texas, is that correct? A. None, no, sir.

Mr. Ross: That completes the direct testimony.

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Cross-Examination

By Mr. Knight:

Q. Mr. Ware, I believe you stated that Lo-Vaca's gas will be delivered to El Paso Gas Supply Company at a point near Three Rivers, Texas, in—what county is that? A. Live Oak County.

Q. Live Oak County. A. Yes.

Q. Will that be a station to be constructed to be known as the Coquat Station? A. I don't know what El Paso intends to call their station, if you are referring to El Paso's station.

Q. Yes.

Will it be delivered to a compression station to be constructed by someone other than Lo-Vaca? A. I don't know that it will be a compressor station. All I know is the point of delivery by Lo-Vaca to El Paso Gas Supply Company. What they intend to construct, I do not know.

Q. Will you please describe in detail the facilities

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through which and by which, by means of which, Lo-Vaca will make its deliveries of gas to the El Paso Gas Supply Company from Lo Vaca's pipeline to the pipeline of El Paso Gas Supply Company? A. Describe in detail the facility?

Q. Yes, sir. A. No, sir, I am not a pipeline engineer. I can't—

Q. That is, you do not know by means of what facilities Lo-Vaca will make deliveries of gas to the El Paso Gas Supply Company? Is that correct? A. By a pipeline.

Q. Is that all you know about the facilities by means of which the movement of gas from Lo-Vaca's pipeline will take place to the pipeline of El Paso Gas Supply Company? A. Mr. Knight, there will be pipelines constructed by Lo-Vaca in various counties in the State of Texas. These pipelines will be connected to the wellhead of various gas suppliers. That gas will move through those constructed facilities to the metering station where it is delivered to El Paso Gas Supply Company and their title passes to El Paso Gas Supply Company.

Q. Yes, sir.

So my question, Mr. Ware, is: I asked you if you could describe the facilities which will exist at that point of delivery by means of which and through which the gas will

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pass from Lo-Vaca's pipeline into the pipeline of El Paso Gas Supply Company?

(35)

That does not encompass in that question your gathering facilities that you just described. It is limited to the facilities by which this gas will move from Lo-Vaca's pipeline to the pipeline of El Paso Gas Supply Company. What facilities will there be? A. There will be two meter runs and two meters.

Q. Is that all? A. That is it.

Q. Just two meters? A. Together with the meter runs and pertinent block valve.

Q. That is what I wanted to find out about, all the block valves and everything, a complete description of the facilities that will be involved in the movement of the gas from Lo-Vaca's pipeline into the pipeline of El Paso Gas Supply Company, a complete description of all facilities. A. I have described it in the detail to which I am able to describe it.

Q. That is just two meters?

Mr. Ross: Now, he said there were two meter runs twice, I believe, Mr. Knight.

Mr. Knight: All right.

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Q. What I want is the description in detail of the facilities through which and by means of which the gas will pass from Lo-Vaca's pipeline into the pipeline of El Paso Gas Supply Company, a complete description of all those facilities regardless of ownership, and then we will come to the question of who owns those facilities. A. The meters will be installed and maintained by El Paso.

Q. El Paso Gas Supply Company? A. Yes, sir.

Presiding Examiner: Is that under the first contract?

The Wtiness: That is in Article 7 of the contract dated May 16th.

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Q. Now referring to the contract of May, 1960, have there been any amendments, modifications or changes of any sort affecting that contract? A. Only the one that I testified to earlier whereby the dedication of gas reserves was increased to make it a total of 640 billion cubic feet.

Q. That is instead of 400 billion there is a dedication of 640 billion, is that correct? A. Yes, sir.

Q. Did you mention that in connection with the March 1960 contract also? A. No, sir, I don't believe.

Q. That applies only to the May 1960 contract? A. Yes, this is the May contract.

Q. And those reserves are different for each contract,

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aren't they? That is the reserves underlying the March contract are not part of the reserves underlying the May contract, is that correct? A. No, sir, they are not.

Q. They are separate? A. Yes, sir.

Q. Thank you.

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John H. Wimberly

was called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Giller:

Q. Mr. Wimberly, would you please state your full name and address? A. My name is John H. Wimberly, my address is 1106 Petroleum Building, Houston, Texas.

Q. What is your connection with Houston Pipe Line Company, sir? A. President.

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Q. Would you please explain to the Examiner something about the background of Houston Pipe Line Company and its relation with Houston Natural Gas Company, whose name has been mentioned here and your relation with Houston Natural Gas Company? A. I am president of both companies. Houston Pipe Line Company is a wholly-owned subsidiary of Houston Natural Gas Corporation, both of which have been engaged over the years in a wholly intrastate business.

Q. What does Houston Pipe Line Company do? A. Houston Pipe Line Company is engaged in the transmission of gas from the wellheads to a relatively small number of industrial consumers and to a number of city gate stations serving distribution systems, serving some 100 cities and towns and communities along the Texas Gulf Coast, all of which are located within the State of Texas.

Q. Is it fair to say that Houston Pipe Line Company is engaged in the purchase, moving and sale of natural gas? A. Yes.

Q. And do you know in what state or states all of the gas purchased by Houston Pipe Line is produced? A. It is all produced in Texas, in the State of Texas.

Q. Do you know whether or not all the gas sold by Houston Pipe Line Company is consumed in the State of Texas? A. It is, I do know it.

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Q. Mr. Wimberly, I hand you here a chart called "System Map, Houston Pipe Line Company, Drawing No. H-1212," are you familiar with it, sir? A. Yes, I am.

Q. What does it show?

Presiding Examiner. Do you want it identified now?

Mr. Giller: Yes.

Presiding Examiner: You ask that this be marked for identification as Exhibit No. 1?

Mr. Giller: Yes, sir.

(The document referred to was marked for identification as Exhibit No. 1.)

By Mr. Giller:

Q. Mr. Wimberly, with reference to the system map identified as Exhibit Houston No. 1, would you please state what is shown by the black section in the map of the United States and Texas in the upper left hand corner? A. That small-scale drawing shows the area along the Texas Gulf Coast that is served by Houston Pipe Line Company.

Q. What is shown by the black lines in the larger-scale map? A. Those black lines are the existing pipeline system of Houston Pipe Line Company.

Q. Are these all the lines of Houston Pipe Line Company? A. Yes, sir, they are. I say they are. I wouldn't

be certain that there is not an isolated stub to a field, which are shown by circles on here, which may not be shown on this map. I can state that the lines extended no further to the east nor any farther to the west than is shown on this map.

Q. What is this dotted or dashed line in the lower left hand corner, Mr. Wimberly? A. Those are a few lines owned by Houston Natural Gas Corporation, the parent company of Houston Pipe Line Company.

Q. And what is the dotted line shown at the west end? A. That is the El Paso Gas Supply line, as I understand it, which is proposed to be built down to Three Rivers, Texas.

Q. What are the red lines, sir? A. That red line between George West and Three Rivers is the line we propose to build to make this delivery of gas to El Paso.

The other red line below that is a line which simply ties in the end of an existing line with the southern end of the other line as shown on the map, the Houston Pipe Line lines.

Q. Thank you sir.

Mr. Wimberly, I hand you here a document labeled on the first page "Contract for purchase and sale of gas between Houston Pipe Line Company and El Paso Natural Gas Company." Are you familiar with that document, sir? A. Generally, I am, yes, sir.

What is that document, Mr. Wimberly? A. It is, as you have just stated it, a contract between Houston Pipe Line Company and El Paso Natural Gas Company.

Mr. Giller: May I have this marked for identification?

Presiding Examiner: The contract may be marked for identification as Exhibit 2.

(The document above described was marked for identification as Exhibit No. 2.)

By Mr. Giller:

Q. Is this the contract under which Houston Pipe Line

Company will sell gas to El Paso Gas Supply Company—excuse me, El Paso Natural Gas Company? A. It is.

Q. And is it because of this contract that the red line on—correction, the new pipeline on the Houston Exhibit No. 1 going up to Three Rivers will be built? A. Yes, sir, it is.

Mr. Giller. At this time I would like to offer into evidence Houston's Exhibit No. 1 and No. 2.

Presiding Examiner: Perhaps we had better, unless there is no objection, we had better wait until we have had cross-examination. But if nobody objects—they may be received in evidence.

(The documents heretofore identified as Exhibit Nos. 1 and 2 were received in evidence.)

By Mr. Giller:

Q. Mr. Wimberly, has the contract with El Paso Natural, that is, Houston's Exhibit No. 2, been amended, sir? A. No, sir, it has not. This is the contract as it stands right here. No amendments, no alterations or deletions, this is it.

Q. Is that the only agreement, the only contract, or all or otherwise, between Houston Pipe Line Company and El Paso Natural Gas Company concerning this entire transaction? A. It is.

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Q. Does that contract restrict the use of the gas to be made by El Paso Natural, sir? A. Yes, sir, it does.

Q. Why is that, sir? A. Why is it?

Q. Yes, sir. A. It is because in our gas supply contracts there is a provision that the gas we buy from producers must not be used for delivery in interstate commerce. Of course, that one thing prohibits our selling any gas in interstate commerce.

Q. Referring now to the map, Houston Exhibit No. 1, would you please tell the Examiner from where the initial supply of gas will come that will be delivered to El Paso Natural Gas Company at Three Rivers? A. Yes, sir. Initially, we make all of the deliveries from the line that runs in a southwesterly directly from George West, showing some six or seven fields connected to it.

Q. Would you please take the official copy and draw a

circle around that line that you have referred to as being the source of gas for the initial deliveries, and just write "initial source of delivery." A. Write on here?

Q. Yes, "initial source of supply."

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Q. Mr. Wimberly, does Houston Pipel Line Company buy gas from Argo Oil Corporation at a point along this stub you have circled—this short line you have circled, called "Initial source of supply" on Houston Exhibit No. 1? A. Yes, sir, it does.

Q. I hand you here a copy of a contract and ask you if you are familiar with it, sir? A. Generally, I am, yes, sir.

Q. What is that, please? A. A contract between Argo Oil Corporation and Houston Pipe Line Company.

Q. For what? A. For the sale and delivery by Argo to Houston Pipe Line for this gas in McMullen County, which is on the far end of the line shown on the map in the area I have just circled.

Q. That is an existing contract, is it, sir? A. Yes, sir. It has been in force for some time.

Q. I refer you now—

Presiding Examiner: Do you want this identified?

Mr. Giller: Excuse me, yes, sir. Would you please identify this as Houston's next exhibit, sir?

Presiding Examiner: This contract, so described, will be marked for identification as Exhibit No. 3

(The document above described was marked for identification as Exhibit No. 3.)

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By Mr. Giller:

Q. You previously testified about some clauses between producers and Houston Pipe Line limiting the right of Houston Pipe Line to sell gas in interstate commerce. I

refer you now to Article XVII, on page 41 of this contract, Houston Exhibit No. 3, and ask you if that is such a clause, sir?

Mr. Knight: What page number is that, please?

Mr. Giller: Page 41.

The Witness: Page 41, Article XVII, Section 17.1.

By Mr. Giller:

Q. Yes, sir. Is that such a clause? A. Yes, sir. This is the provision that is in the contract and it has not been amended; it is in there now.

Q. This provision then, Article XVII of Houston Exhibit No. 3, has not been amended; is that correct? A. It has not.

Q. Do you know if the other contracts for supply of gas from which the initial supply will be made to El Paso Natural Gas Company have similar clauses? A. Each contract for the delivery of gas to Houston Pipe Line along the line I have circled from which all of the initial deliveries will come, all have the same or a similar provision in the contracts.

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Cross-Examination

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By Mr. Knight:

Q. In order that I may be sure not to be passing up anything that I ought to question Mr. Wimberly about, Mr. Wimberly, could you state briefly, please, what would be the scope of your testimony in this proceeding? That is, why you were called as a witness? A. As I understand it simply first of all to give to you and the Commission

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the enterprise, the business of Houston Pipe Line, to testify that it buys gas only from producers in the field in Texas, that our entire gas supply, 100 percent of it is produced in the State of Texas, that we have no sales now, nor ever have had any that went interstate, that our sale to El Paso is restricted to use in Texas in compressor stations with the exception of the sale to Phillips for the operation of its gasoline plant in West Texas, to the effect that El Paso has provided in this contract or it is provided in the conract that El Paso will never take more gas from us at any time than it uses in these compressor stations, that the contract—or that we have representations from them that our gas physically can get to these compressor stations for use in those compressor stations, that we find ourselves in this situation of having to get this matter clarified because of the provisions in our gas supply contracts that should we ever intend to sell gas for interstate deliveries,

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we must give due notice to our suppliers and that they, in turn, then, under the terms of their contracts with us, have the right to terminate their contracts. So that if we should enter into this scheme of things without going through this procedure, that we would have to give notice. That our producers might cancel—and I suppose some of them would—so that this gas would not be available to El Paso in any event. So we found it necessary to go through this procedure and I suppose it is on all of those things is the reason I am here, but not about the technicalities or the delivery and flow streams. I don't know anything about that, sir.

Q. Is it correct to assume that the Houston Pipe Line Company has not made any inquiry as to just how this Houston gas is to get to the various El Paso facilities in which it is to be used as fuel but is accepting El Paso's

assurance that it will get there? Houston has not made any inquiry of its own into that connection? A. I think they have furnished us this map and this flow stream, the diagram, showing—

Q. That is you are relying on the diagram, the map which is supplied to you by El Paso and the covenants and agreements in the contract? A. And also what has been said. Mr. Paul Keyser has told me, himself, that this gas physically can get to

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every compressor station on their system, that if it takes a realignment of facilities they will be realigned and this gas can get there and I think he is a man of his word and I rely on that, sir.

. . . . . .

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Barry Hunsaker

was called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Giller:

. . . . . .

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Q. I think that will help, Mr. Hunsaker. Now will you please explain in more detail what is shown on the map Houston Exhibit 6? A. Yes. The legend in the upper right hand corner of the map shows that the pipeline proposed to be constructed and operated by Supply Company at their Docket CP61-101 is represented by a dotted red line, or actually a red line consisting of a series of dots. The map shows that this pipeline will extend from a point

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near Three Rivers in Live Oak County, Texas, to a point of connection with El Paso's existing Sonora pipeline near Sonora, in Sutton County, Texas.

This line will be utilized by Supply Company to transport between these two points the comingled stream of gas to be purchased by El Paso from Houston and Lo-Vaca. As the map shows, this pipeline is wholly within the State

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of Texas or will be wholly within the State of Texas.

The legend also shows that El Paso's existing and proposed pipeline which will transport the Houston gas in a common stream with other gas produced in Texas from the Supply Company delivery point near Sonora to the various plants located in Texas, which will utilize the Houston gas as fuel, are shown by the solid green and solid red lines.

El Paso's existing pipeline facilities which will not transport any of the Houston gas and which are therefore not pertinent are shown in black.

Q. Mr. Hunsaker, in what county is the Phillips plant located to which gas will be delivered under the El Paso-Houston Pipe Line contract? A. That plant is located in Ector County, Texas, immediately adjacent to El Paso's Goldsmith plant.

Q. You have been here today throughout all the testimony in this case, have you not? A. Yes, sir, I have.

Q. Did you hear Mr. Ware testify about transactions between Lo-Vaca and a Phillips plant? A. Yes, sir, I did.

Q. That is in another country, is it not? A. Yes, sir, it certainly is.

Q. Mr. Hunsaker, will you please specifically point out by name and location those plants located in Texas shown

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on Houston Exhibit No. 6 in which the gas delivered by Houston will be consumed on the system of El Paso? A.

Yes. The existing El Paso plants are: Sonora Plant in Sutton County, Pembrook Plant in Upton County, Midkiff Plant in Reagan County, Driver Plant in Midland County, Sweetie Peck Plant in Upton County, McElroy-Crane Plant in Crane County, Goldsmith Plant in Ector County, Fullerton Plant in Andrews County, Wasson Plant in Yoakum County, Plains Station in Yoakum County, Dimmitt Station in Lamb County, Keystone Field Plant in Winkler County, Keystone Mainline Station in Winkler County—

Presiding Examiner: Right down near Keystone Field?

The Witness: It is immediately to the left of Keystone Field, about a quarter of an inch, sir, where the red line originates.

Presiding Examiner: Very well.

A. (Continuing)—Station No. 1 in Culberson County, Guadalupe Station in Culberson County, Cornudas Station in Hudespeth County, Station No. 2 in Hudespeth County, Hueco Station in Hudspeth County, and El Paso Station in El Paso County.

The proposed El Paso plants are the Crockett Station to be located in Crockett County and the Upton Station to be located in Upton County.

In addition the Supply Company proposes Coquat Station

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to be located in Live Oak County.

Q. There is no agreement that you know of between El Paso and Houston Pipe Line amending the Houston-El Paso contract to permit El Paso Supply to use Houston's gas in that Coquate Station, is there? A. No.

Q. The gas purchased from Lo-Vaca, both the gas purchased that has its end use restricted and the gas purchased that doesn't have any end use restricted, will pass through that Coquat Station, isn't that true? A. Yes, that is true.

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Presiding Examiner: Let me ask one question there, if I may.

At Wasson, that is right in the Wasson Field?

The Witness: Yes.

Presiding Examiner: A desulphurization?

The Witness: Compression and dehydration.

Presiding Examiner: That is for the Wasson-Dumas loop?

The Witness: Well, actually that receives gas, residue gas from Shell who is the operator of the gasoline plant in the Wasson Field and injects it into what we call our Dumas line south of our Plains Station and the gas travels from that point north.

Presiding Examiner: And West?

The Witness: Yes.

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Presiding Examiner: West from Plains?

The Witness: Yes.

Presiding Examiner: Thank you.

By Mr. Giller:

Q. Mr. Hunsaker, will the proposed pipelines shown extending from the McElroy-Crane, Fullerton and Wasson plants to the transmission lines be used to transport fuel gas? A. Yes. These proposed lines will be used to physically transport the Houston gas back to these three respective plants for use as fuel.

Q. Excuse me.

Are all of these plants, that is the El Paso plants and the Phillips plant to which you have just testified, located downstream from the point of delivery by Houston Pipe Line at Three Rivers, Texas? A. Yes, sir.

Q. And is there a connection between all of these plants and Three Rivers, Texas? A. Yes, sir.

Q. Through the system? A. Yes, sir.

Presiding Examiner: Isn't there some further construction necessary before it is all connected?

The Witness: We have pipelines through which this gas can be taken to each of the stations we have mentioned except

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these three.

Presiding Examiner: You mentioned some located on the red line.

The witness: Of course the red line must be constructed first, you are right.

Mr. Giller: Yes, sir. I meant after the proposed construction to which he has testified will be made.

Presiding Examiner: Yes, sir. I was trying to get that straight. I found some of them as he read them, on the red line.

Mr. Giller: Yes, sir.

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By Mr. Giller:

Q. I hand you here a chart, Mr. Hansaker, entitled "South Texas Project, Flow Diagram, Average Day Utilization of South Texas Gas for Plant Fuel, Drawing No. A-3-130." Are you familiar with it, sir? A. Yes, sir, I am.

Q. Was it prepared under your supervision? A. Yes, sir, it was.

Mr. Giller: May we have this marked as Houston's next exhibit?

Presiding Examiner: It is marked for identification as Exhibit 7.

(The document referred to was marked for identification as Exhibit No. 7.)

Presiding Examiner: Did you forget to offer 6?

Mr. Giller: Thank you, sir.

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Before we go further into Houston Exhibit 7, I would like to offer into evidence the map, Houston Exhibit 6.

Presiding Examiner: Any objection?

Hearing none, Exhibit 6 will be received in evidence.

(The document heretofore identified as Exhibit No. 6 was received in evidence.)

By Mr. Giller:

Q. Mr. Hunsaker, would you please explain first generally, and then more in detail, what this diagram,

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Houston Exhibit 7, shows? A. This exhibit shows the anticipated average day fuel requirements of supply companies, El Paso's and Phillips' plants located in Texas, which are to be supplied with fuel gas from the gas to be purchased from Houston.

The individual fuel requirements of each station are shown adjacent to the station symbol and generally under the name of the station.

In addition, these individual station requirements are tabulated in the lower left-hand portion of the flow diagram.

The existing and proposed pipelines through which the Houston gas will be transported are shown by the red, black and blue lines.

The direction of flow of the gas is indicated by large red arrows with the notations "Houston Pipe Line gas and Lo-Vaca Gathering Company gas," or "Houston Pipe Line Company gas," printed above the arrows.

The flow diagrm is not intended to depict the accurate geographic location of of these individual plants, but we have shown schematically on the diagram the Texas State boundary.

As a matter of fact, we have also shown the Arizona—New Mexico State boundary. It is schematically correct, but geographically it is not accurate nor to scale.

Q. What is the significance of these notations to

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which you have just testified? Houston Pipe Line Company gas, or the Houston Pipe Line and Lo-Vaca Company gas. A. These arrows indicate the direction of flow which the Houston gas must take in order to reach the stations at which we intend to use it for fuel.

Q. What is the westernmost plant in Texas which will use Houston Pipe Line Company gas as fuel, as shown on this Houston Exhibit 7, that is, on an average day? A. Hueco Station. The fuel requirements of this station as shown on the flow diagram are 4,058,000 cubic feet per day. Of this total, we would consider that 3,015,000 cubic feet per day would be Houston Pipe Line Company gas.

Q. Now, that would be true if you would consider the consumption by Coquat Station of the supply company as being made in accordance with the contract between El Paso and Houston Pipe Line? A. Yes, sir.

Q. However, since there has been no amendment of the contract between Houston Pipe Line and El Paso Natural as of now, how much would this figure you have for Hueco be reduced? A. In that event, all of Hueco's fuel requirements will be considered as coming from Houston Pipe Line Company, and in addition there, too, it would be necessary to consider a small portion of El Paso Station's fuel

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requirements as being requirements from Houston.

Q. Yes.

Now, look over to the right-hand edge of the Exhibit 7 as the Coquat Station. There is a small black figure which says 69.622 million cubic feet of Houston Pipe Line Company gas.

There has been some statements about 70 million cubic feet to be delivered by Houston Pipe Line to El Paso Natural. Can you explain the difference between the

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70 million and the 69.622 million? A. Yes. The 70 million figure is a contract volume and it is based on the contract pressure base of 14.65.

The figure 69.622 shown on the flow diagram is that volume converted to a 14.73 pressure base.

Q. I don't know if you have testified or not, but what is the volume available for use as fuel gas at the El Paso station of El Paso Natural Gas Company? A. 5,048,000 cubic feet per day.

Q. Now, what basis did you use in determining the average day fuel requirements of the Texas plants shown on this diagram, Houston Exhibit 7? A. In the case of existing plants, we used our actual past historical experience. In the case of proposed plants, we used a design fuel rate factor which likewise is based upon experience.

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Q. Mr. Hunsaker, does this diagram, Houston Exhibit 7, show conclusively that El Paso has average day fuel requirements at these Texas plants to which you have testified of such magnitude that the total of such average day fuel requirements exceeds the average day volume of gas to be purchased from Houston? A. Yes, sir, it does.

Q. Does it also show that by means of existing and proposed pipelines, the proposed pipelines to which you have testified, located wholly within the State of Texas, the fuel requirements of such plants can and will be supplied from a common stream containing only Houston gas and other gas produced in the State of Texas? A. Yes, sir.

Q. Will any gas produced outside the State of Texas be transported in any of the pipelines shown transporting the Houston gas? A. No, sir.

Mr. Giller: I would like to offer into evidence as Houston Exhibit No. 7, if I have not already done so, this map.

Presiding Examiner: Any objection?

It will be received as Exhibit 7.

(The document heretofore identified as Exhibit No. 7 was received in evidence.)

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By Mr. Giller:

Q. Mr. Hunsaker, I show you here a diagram bearing the legend in the title block in the lower right-hand corner, "South Texas Project, Flow Diagram-Maximum Day Utilization of South Texas Gas for Plant Fuel, Drawing No. A-3-131." Are you familiar with this, sir? A. Yes, sir, I am.

Q. Was it prepared under your supervision? A. It was.

Mr. Giller: May we have this marked as Houston's next exhibit for identification, please?

Presiding Examiner: It may be marked as Exhibit 8 for identification.

(The document above described was marked Exhibit No. 8 for identification.)

By Mr. Giller:

Q. Mr. Hunsaker, would you please explain this exhibit, Houston Exhibit 8? A. Well, the format of this exhibit is essentially the same as that of the average day exhibit, Exhibit No. 7, which we just discussed. However, this particular exhibit shows the peak day fuel requirements of the Texas plants which will utilize the Houston gas as fuel, and it also shows the maximum daily contract volume being purchased from Houston.

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Q. At which station will the aggregate fuel consumption equal the volume purchased from Houston Pipe Line on this maximum day flow diagram, Houston Exhibit No. 8? A. The last station on the bottom pipeline which will use

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Houston gas as fuel is McElroy Crane. The last station on the pipeline at the top of the page which will use Houston gas as fuel is Dimmitt Station.

Q. Is that true whether or not you consider the use by Coquat to be the use of Houston Pipe Line-delivered gas? A. If we were to consider that Coquat or the supply company did not use Houston gas as fuel, et cetera, then Dimmitt—then we would consider that all of the Dimmitt's fuel would be Houston gas, and in addition it would be necessary to reach down to one more station going west from McElroy Crane.

Q. Then is it true that the fuel requirements of the Texas plants located to the west of Keystone M.L. would be considered as excess capacity over the volume actually purchased from Houston Pipe Line? A. Yes, that is correct.

Q. And about what is this excess fuel in those other plants? A. It is 31.879 million cubic feet per day.

Q. That is including if any gas should be used at Coquat, is that right?

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A. Let me check that figure just a moment.

Yes.

Q. Excuse me. I did not hear your answer. Were you saying that this 31.879 million cubic feet assumed that Coquat might be using gas purchased from Houston Pipe Line? A. Yes, it does.

If you delete the use of Houston gas by the supply company, then the surplus becomes 29,916,000 cubic feet per day.

Q. So there is still over 29 million cubic feet per day excess at the peak flow in El Paso's line, is that correct? A. Yes, sir.

Q. What basis did you use in determining the maximum day fuel requirements of the Texas plants shown on this

diagram, Houston Exhibit No. 8, Mr. Hunsaker? A. We used design fuel rate factors.

Q. Does this flow diagram, Houston Exhibit No. 8, show conclusively that El Paso's and Phillips' maximum day fuel requirements at these Texas plants are of such magnitude that the total of such maximum day fuel requirements exceeds the maximum day volume of gas to be purchased from Houston Pipe Line Company?

Ormasa: Just a moment. I object to the use of the term "conclusively," if Your Honor please. I think that is

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expressing too much of an opinion in the matter. I have no objection to the question if he strikes that one word.

Mr. Giller: If he wants to cross-examine the man on this subject, I think that is his right, but I would like to have my question answered if I may.

Presiding Examiner: Well, I think some of the quantities speak for themselves on the exhibits and the premise is the same as was involved in North Dakota v. Federal Power Commission, and in Oklahoma Natural, that there would be volumes in excess of the quantities involved in the contracts in both of those cases.

So I don't think it is necessary to drive it home by the oral testimony.

Mr. Giller: In that event, I will withdraw the use of the term "conclusive," which I think was the objection made by the gentleman. And may I restate my question, then?

Presiding Examiner: All right.

By Mr. Giller:

Q. Mr. Hunsaker, does the flow diagram, Houston Exhibit No. 8, show that El Paso's and Phillips' maximum day fuel requirements at these Texas plants are of such magnitude that the total of such maximum day fuel re-

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quirements exceeds the maximum day volume of gas to be purchased from Houston Pipe Line Company? A. Yes, sir.

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By Mr. Giller:

Q. Mr. Hunsaker, let me refer you again to Houston Exhibit No. 8 and the last question. What are the maximum day volumes of gas that you have referred to? What is the volume in Mcf? A. Those purchased from Houston?

Q. Yes. A. Seventy million cubic feet of gas per day at a pressure base of 14.65. That volume converted to a pressure base of 14.73 is equivalent to 76,584,000 cubic feet per day, and that is the volume shown in the lower right-hand corner of Exhibit 8.

Q. Thank you.

Does this exhibit, Houston Exhibit No. 8, also show that by means of existing and proposed pipelines located wholly within the State of Texas, the fuel requirements of such plants will be supplied from a common stream containing Houston gas and other gas produced in the State of Texas only? A. Yes, sir.

Q. What is the relation between El Paso Gas Supply

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Company and El Paso Natural Gas Company? A. The Supply Company is a wholly owned subsidiary of El Paso Natural.

Q. These exhibits, Houston Exhibit 7 and Houston Exhibit 8, have referred to conditions on the average day and on the maximum day.

At all times will the volume of gas received from Houston, that is, Houston Pipe Line Company, be consumed in Texas at points downstream and connected with the point of delivery by Houston Pipe Line to El Paso? A. Yes, sir.

Q. Will any gas produced outside the State of Texas be transported in any pipelines shown transporting the Houston Pipe Line gas on this Houston Exhibit No. 8? A. No, sir.

Mr. Giller: We would like to introduce Houston Exhibit No. 8, Mr. Examiner. We offer that into evidence.

Presiding Examiner: Any objection?

Mr. Knight: No objection.

Presiding Examiner: Exhibit No. 8 will be received.

(The document heretofore identified as Exhibit No. 8 was received in evidence.)

By Mr. Giller:

Q. Mr. Hunsaker, I hand you here a drawing entitled "South Texas Project, Flow Diagram Showing Southern System

Design Capacity, Drawing No. A-3-127." Are you familiar with this drawing, No. A-3-127, Mr. Hunsaker? A. Yes.

Q. Was it prepared under your supervision? A. Yes.

Mr. Giller: May we have this marked for identification?

Presiding Examiner: It will be marked for identification as Exhibit No. 9.

(The document above described was marked for identification as Exhibit No. 9.)

By Mr. Giller:

Q. Mr. Hunsaker, I also hand you a diagram entitled "South Texas Project, Flow Diagram Showing Permian Field Design Capacity, Drawing No. A-3-129." Are you familiar with that drawing, Mr. Hunsaker? A. Yes, sir, I am.

Q. Was it prepared under your supervision? A. It was.

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Mr. Giller: May we have this marked for identification as Houston's next exhibit, please?

Presiding Examiner: The flow diagram so described will be marked for identification as Exhibit No. 10.

(The document above described was marked for identification as Exhibit No. 10.)

By Mr. Giller:

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Q. Mr. Hunsaker, would you please explain what these Houston Exhibits 9 and 10 show? A. These exhibits were prepared for El Paso's application at Docket CP61-26 and are presented here for the purpose of showing that after acquisition of and completion of facilities for the South Texas Project, the gas to be purchased from Houston and La-Vaca at maximum design conditions will be commingled only with Texas-produced gas, and that its flow will be continuous and down stream at all times from its source to its points of ultimate consumption within the State of Texas.

Exhibits 7 and 8 are easier to understand since they are less complicated, but they do not show all of El Paso's Permian Basin and Texas mainline pipelines.

Q. Mr. Hunsaker, you have testified these flow diagrams, Houston Exhibits 9 and 10, show conditions under maximum design operations. Would your statement concerning the continuous and downstream flow of the Houston gas and its commingling only with Texas-produced gas also be true on all other days? A. Yes, sir.

Q. Now, referring to Houston Exhibits Nos. 9 and 10, how much of the system, the existing system of El Paso in the area which these cover do these show? A. Exhibit 10 shows all of the major pipeline facilities

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in the Permian Basin area. It does not show gathering systems.

Exhibit 9 shows all of the mainline pipelines in what we call our Southern System, perhaps with the exception of some very small lateral lines to sales points. All major lines are shown.

Q. That is true as of today, is it? A. Yes, sir.

Q. Would you please take a look at these Houston Exhibits 9 and 10 and explain the different colored lines on there, sir? A. Yes. Beginning with Exhibit 9, all of our existing pipeline facilities are shown in black. Those pipeline facilities pending, and in this case they are pending at Docket G-18616, are shown in blue.

On Exhibit 10, we have shown all of our existing pipeline facilities in black. Those pipeline facilities proposed at Docket G-15696 are shown in green. Those pipeline facilities proposed at Docket G-18616 are shown in blue. And those pipeline facilities proposed at Docket CP61-26 are shown in red.

Q. Are the directions of flow of gas shown on these Houston Exhibits 9 and 10? A. Yes, sir.

Q. And how is that indicated, Mr. Hunsaker? A. It is indicated by arrows with volumes of gas printed adjacent to those arrows.

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Q. As I understand your previous testimony, even with all these lines of El Paso in this area, still there will be no gas produced outside the State of Texas that will be commingled with the gas purchased from Houston Pipe Line Company ahead of the consumption of that volume of gas purchased from Houston Pipe Line Company. Is that correct? A. That is correct.

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John H. Wimberly

Further Cross-Examination

By Mr. Laster:

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Q. I believe that you mentioned yesterday that the line southwest of the point labeled George West on this map, and I am assuming here that George West is the point of intersection of those three pipelines which seem to converge at that point.

We understand that the line southwest is called the initial source of delivery. Tell me just what did you mean by "initial source of delivery"? A. I meant by that that if and when deliveries start under this proposed contract that we can furnish, initially, all of the gas that is needed under that contract from our

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sources of supply along the line you just described.

Q. In other words, this line represents your capabilities with regard to the initial quantity which is to be delivered under this contract? A. I don't believe that is altogether accurate. It doesn't represent our capabilities because we have more capability than that. I simply have said that initially we can supply all of the needs from our sources of supply along that line.

As a matter of fact, our entire system rests behind this contract, all of our capabilities.

Q. I see.

In other words, you are not relying upon some sort of a reservation that this particular line represents the gas which is reserved for El Paso under these contracts? A. We are not.

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By Mr. Laster:

Q. We would appreciate knowing that if Houston is going

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to rely upon its system capacity here and take gas from other areas than what is labeled here as initial source of delivery, we would like to know just where those other areas are located on this map? A. All right, sir. I said that initially we can, and I suppose will, initially, furnish all of the needs under this contract from our gas supply along the line extending in a southwesterly direction from George West, which we have described, initially.

Our contract says that our entire system, all of the supply, stands back of this contract. I can't say and I don't know that anybody can say right now from which field or where this gas is all going to come from. The entire system is back of it. This system is located entirely within the state. We buy gas only from producers in the field. All of the gas to be delivered, however, it may be delivered through this system of lines to Three Rivers, will be gas that is produced in the State of Texas. Only initially will we begin deliveries from this particular point.

Now, I don't know, time may have something to do with that. By the time these deliveries begin it may be necessary to feed some more gas into that point, I don't know.

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By Mr. Laster:

Q. My question was simply whether or not all of your producer contracts, Mr. Wimberly, have a clause such as Exhibit 4? Exhibit 4, just to recall to your mind, is the

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provision of your Argo contract which is entitled "Sales by Buyer in Interstate Commerce." A. Yes, I have it.

All of our gas supply contracts along this particular line have either this or a similar provision in them.

I know, without having ever seen all of our gas supply contracts which do not have this provision in them. I know, too, from my own knowledge that in the last several years that we have not entered into any gas supply contracts that do not have this provision in them.

I know from just general knowledge in my job that some years ago, back in the 1940's, I suppose, let's say maybe prior to the Phillips decision—I am not sure, I am not entirely familiar with those matters—that there may be some contracts which we have which are of long standing which do not have this particular provision in them. I know, further, from my own knowledge, that a large percentage—and I am not prepared to say how much—of the reserves that we have available to us, simply because they are the more recent contracts, do have this provision in them.

But I know, too, that 100 percent of our gas supply contracts do not have this requirement in them.

Q. Well, can you testify with regard to this which do not have this provision that gas from these wells will never reach El Paso under this arrangement?

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A. No, I could not testify to that. Our whole system is back of it.

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By Mr. Ormasa:

Q. I wonder if your counsel could furnish you with copies of Exhibit No. 7 and Exhibit No. 8? A. I have them, sir.

Q. Now, I would like you to turn your attention to Exhibit No. 7 first, if you would please, sir.

You were here, were you not, when Mr. Hunsaker testified yesterday concerning this particular exhibit?

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A. I believe I was in the room most of the time. I was out of the room sometime while he was giving his testimony, Mr. Ormasa.

Q. Are you familiar with the fact that this exhibit sets forth various compressor stations? A. Yes, sir.

Q. And some of those compressor stations are located in the State of Arizona; is that correct, sir? A. Yes, sir.

Q. Some of them are located in the State of New Mexico, is that correct, sir? A. Yes, sir.

Q. And some of those are located in the State of Texas; is that correct, sir? A. Yes, sir.

Q. To your knowledge, is it not a fact that the gas pipeline system of Houston Pipe will connect at Three Rivers with a pipeline system which ultimately reaches those compressor stations in the State of Arizona and the State of New Mexico? A. Yes, sir. That is all recognized in the contract, everything we have been over, that our gas will go in a commingled stream, part of which will leave the state.

Q. That is set forth in Article XVI of your contract, Exhibit B-1, in this proceeding; is that correct, sir?

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Mr. Giller: Again, Mr. Examiner, I must object to any interpretation of the contract by this witness, and I believe that is what that question asks.

Mr. Ormasa: I didn't ask him to interpret anything. I merely asked him if what he said was set forth in Article XVI of the contract.

Presiding Examiner: I don't believe that that is a question to explore orally. I think the contract speaks for itself. The witness has frankly stated both on direct and cross-examination the fact that they understand that the gas will be commingled, and it is a contractual rather than a physical separation.

Mr. Ormasa: I think the point is well made, Mr. Examiner. There is no point in belaboring it further.

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By Mr. Ormasa:

Q. Turning your attention again to Exhibits Nos. 7 and 8, Mr. Wimberly, setting forth the schematics of the compressor stations, is it not true that physically the so-called Houston Pipe Line gas can go anywhere on that system where we have the designation of Lo-Vaca Gathering Company gas?

Mr. Ross: May I have the question read back, please?

Presiding Examiner: You may.

(Question read)

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The Witness: I assume that is so, but Mr. Hunsaker could better answer that than I.

By Mr. Ormasa:

Q. Mr. Wimberly, you have quite a bit of experience in the pipeline business, is that correct, sir? A. Yes, sir, I have been in it for some time.

Q. You are familiar with the fact that this commingled gas starts at Three Rivers? A. Yes, sir, it starts there.

Q. Can you give me any reason that you can think of why the Lo-Vaca gas could reach a point that could not be reached by the commingled Houston Pipe Line gas? A. No, sir, I cannot. I suspect some of it will end up on the West Coast.

As we have said before, this is a contractual rather than a physical separation, and the contract recognizes that, we all recognize it.

Q. Always glad to see gas on the West Coast, Mr. Wimberly.

Then, if I understand you correctly, you are saying that although your contract provides for consumption of the Houston gas within the State of Texas, that physically this is not necessarily true? A. I think that is correct, yes, sir.

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Mr. Ormasa: I think the question I asked last, Mr. Examiner, was that assuming that the gas was physically delivered at Three Rivers, would it make any difference whether or not the contract contained the prohibition.

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Presiding Examiner: Can you answer the question now that we have tried to clarify it here as to just which contracts are involved?

The Witness: Assuming that our gas is delivered, would it make any difference as to whether this prohibition is in our contract, any difference in what?

By Mr. Ormasa:

Q. In the physical delivery of gas along the pipeline system. A. Whose pipeline system?

Q. El Paso's.

(200)

We will get there yet. A. I suppose not.

Q. Is it your position, Mr. Wimberly, that there is any physical result from these contract prohibitions or that the result is any different than a bookkeeping entry as to an allocation as to sources of gas and distribution of that gas? A. You will have to repeat that question. I am sorry but you lost me.

(Question read)

The Witness: I don't know about a bookkeeping entry. I repeat the only way I know how to answer it is that we realize the contract has provisions in it to the effect that our gas enters into a commingled stream, that this

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separation as to the use of this gas by El Paso is a contractual one and not physical—and not physical.

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Redirect Examination

By Mr. Giller:

Q. Mr. Wimberly, I hand you a copy of Houston Exhibit No. 2, the contract between Houston Pipe Line Company and El Paso Natural Gas Company.

Do you expect El Paso Natural Gas Company to live up to their contract? A. Yes, sir, I certainly do.

Mr. Giller: No further questions.

Mr. Knight: I have one question, if I may, Mr. Examiner.

Presiding Examiner: All right, Mr. Knight.

Mr. Knight: This is along the line that Mr. Wimberly has been testifying very forthrightly and I think we can sum it up in one or two questions. That is, Mr. Wimberly's position as president of the Houston Pipe Line Company is that he is under no illusion and makes no pretense that physically the gas which Houston will sell to and deliver

to the El Paso Natural Gas Company, will not go into various states, not

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only Texas but also New Mexico, Arizona and even California, along with the other gas in that commingled stream.

Recross-Examination

By Mr. Knight:

Q. Isn't that your position? A. Yes, sir.

I contend only that the gas that we deliver to El Paso is produced wholly within the State of Texas and enters into a commingled stream, some of which leaves the state, yes, sir.

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By Mr. Knight:

Q. And Houston gas just goes along with that commingled stream wherever that commingled stream goes? A. Yes, sir

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Jack Ware

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was recalled as a witness, and having been previously sworn, was examined and testified further as follows:

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Further Redirect Examination

By Mr. Ross:

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By Mr. Ross:

Q. Is it not a fact that under each of the contracts, the May contract and the March contract, gas reserves are to

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be specifically dedicated separately to each contract? A. According to the contract, yes, sir.

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Further Cross-Examination

By Mr. Laster:

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By Mr. Ormasa:

Q. Were they practically simultaneous negotiations? A. No, sir.

Q. One of which ended sooner than the other? A. They were not simultaneous, they were overlapping. Prior to the actual execution of the March contract, we had commenced negotiations on the May contract.

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Q. I wonder if you could help me on this, Mr. Ware.

You said that the deliveries of gas under the two contracts, two basic contracts, will be separately metered. Just how does that work? A. The only way I can answer that question is to call your attention to the provisions in the contract, that the gas purchased under each contract calls for a meter and meter run to be installed by El Paso with the allowance on the part of Lo-Vaca to install a check meter. That is a contractual requirement.

As to the mechanical end of it, I am, again, going to tell you I am not an engineer. I don't know how they are going to go about that.

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[Barry Hunsaker]

Cross-Examination

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By Mr. Knight:

Q. Mr. Hunsaker, do you have before you Houston's

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Exhibits 6, 7, 8, 9 and 10? A. Yes, sir, I believe I have all of those with me here.

Q. Inviting your attention to Exhibit 10 and to Exhibit 6, Exhibit 6 shows near the lower right-hand corner the Coquat compressor station which El Paso Gas Supply Company proposes to construct. That is correct, is it not? A. Yes, sir.

Q. Now, it is my understanding that that is the point at which the gas which is involved in this proceeding, that is, Houston's gas and Lo-Vaca's gas, will be received into the pipeline of the El Paso Gas Supply Company. Is that not correct? A. That is the approximate point.

Q. Yes. A. Yes, sir.

Q. The gas from all of those sources involved in this proceeding will move through the Coquat compressor station, is that correct? A. Yes, sir.

Q. Will Houston's gas be separately metered, aside from Lo-Vaca's gas, before going into the Coquat station? A. Yes, sir.

Q. And will the gas which is sold under Lo-Vaca's March 1960 contract be separately metered from the Lo-Vaca

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gas which is sold under the May 1960 contract before going into the Coquat station? A. I suppose it will be if required. We haven't formulated any definite plans with respect to that metering.

Q. That is, that is something that still remains to be

determined? A. Yes. We will do whatever is required.

Q. But if the gas under those two contracts is not separately metered, at least Lo-Vaca's gas will be separately metered from Houston's gas before going into the Coquat station? A. Yes, sir.

Q. I believe that the contracts provide that El Paso Gas Supply Company will construct and own and operate those metering devices, but that is something I can check in the contract, or do you recall offhand? A. That is the case in the contracts with Lo-Vaca, that is not the case in the contract with Houston. Houston will install their own meters.

Q. Houston will install its own? A. Yes, sir. I believe I have that correct. Yes, I have.

Q. That is set out in the contract and I can refresh my recollection by that means.

Will gas from any source other than Houston and Lo-Vaca

move into and through the Coquat station? A. There are no plans at this time to move any gas other than the Lo-Vaca and Houston gas through that station.

Q. But so far as you know, there is no contractual or physical impediment to prevent gas from other sources moving through that station in the future? I am asking that in the form of a question. A. Not that I know of.

Q. Then from the Coquat station the gas will emerge into the pipeline which is proposed to be constructed by the El Paso Gas Supply Company; is that correct? A. Yes, sir.

Q. And of course it is just a matter of reasoning that that gas from those two sources, Lo-Vaca and Houston, will be fully commingled at that point when it gets into that pipeline? A. Yes.

Q. Yes.

So the gas goes on up to Sonora.

Now, the Coquat station will be fueled by gas, will it not? A. Yes, sir, it will.

Q. Which will of course be gas from both Houston and Lo-Vaca. That is correct, is it not? A. That is correct.

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Q. Now, at the point of delivery which I understand from the contract, takes place just before the gas gets into the Coquat station, at that point El Paso Naural Gas Company takes title to the gas under the contracts, I believe. Is that your recollection? A. I believe we do, Mr. Knight.

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Q. Now, we come to Sonora and I believe that is the first of El Paso Natural's facilities which is shown in the list on Exhibit 7 as being fueled by the Houston Gas. That is that list there.

Now, I am stating a lot of these things which I will ask you to confirm, rather than just asking the question, you just confirm them.

That is a correct statement, the first of the stations listed? A. Yes, that is correct.

Q. We move on through Sonora and looking at Exhibit 10, we pick up some gas from the Vinegarone Field into El Paso's mainline, do we not? A. Yes, sir, we do.

Q. Which, of course, is commingled with the gas already in there, that is with the gas that was obtained from Houston and Lo-Vaca?

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A. That is correct.

Q. And as this gas moves along El Paso Natural Gas Company's mainline on up to the Emperor Field in Keystone, it picks up gas from numerous additional sources in the Perminan Basin? A. Yes, sir.

Q. All of which gets into El Paso's main pipeline and is mixed up, commingled. A. That is correct.

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By Mr. Knight:

Q. Now, Mr. Hunsaker, continuing westward on Exhibit 6, on that journey westward, El Paso's main line through the Permian Basin receives gas from numerous sources, all of which of course is commingled with gas already there in the pipeline. I believe we agree on that, do we not? A. Yes.

Q. And also on that journey westward up the main line, El Paso's main line, that is, some of this commingled gas is used as fuel in various El Paso facilities, that is, compressor plants and gasoline plants and dehydration plants and so forth. That is correct, is it not. A. Yes.

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By Mr. Knight:

Q. Now, continuing westward, Mr. Hunsaker, through the Emperor Field in the Permian Basin, we go over into

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Lea County, New Mexico, do we not? A. Some of the pipelines do, yes, sir.

Q. Does El Paso have any pipeline that runs up through Sonora, Crockett, Upton, Crane, Ector and Loving Counties, Texas, that do not go over into this Lea County, New Mexico? A. Existing pipeline?

Q. Existing pipeline. A. Speaking in terms of gas flow, no.

Q. That is, all the gas flowing along through the Permian Basin system, El Paso's Permian Basin system now, along

this route shown on Exhibit 6, through existing lines, flows over into Lea County, New Mexico, is that correct? A. No, sir, it is not.

Q. What correction should be made in that statement? A. Some of the gas flows north to the Dumas line and then to—

Q. Where does that leave the line that runs up by Wilshire, Waddell and through the Emperor Field? Where does that Dumas gas leave there? A. It leaves at Goldsmith.

Q. Now, which is your main route here? A. Up through Sweetie Peck to Goldsmith, or by way of Wilshire, Waddell and up through what is called K. Emperor there?

A. They are both major arteries, Mr. Knight. I believe the Upton County line which is the lower line, carries a greater volume of gas at the present time.

Q. Yes. That would be the one that flows by the Wilshire and Waddell plants. A. Yes, that is right.

Q. Of course from those Wilshire and Waddell plants gas flows from those plants into El Paso's main line then, doesn't it? A. That is correct.

Q. And of course you have a junction here where a line—near where the Upton compressor station is going to be constructed shown by a red dot there in Upton County. That is where some of the gas leaves one of the lines and goes up towards Goldsmith, isn't it? A. Yes, sir.

Q. Now leaving for the time being this gas that goes up by Goldsmith, and that is the Phillips Goldsmith plant that we are talking about, isn't it? A. Well, and also our plant.

Q. Yes.

Presiding Examiner: I have lost you on Goldsmith. Where is that?

I see it. Excuse me.

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By Mr. Knight:

Q. Leaving that out of our discussion for the time being and looking at this lower line down here, that gas gets into this five-track system of lines that run over into Lea County, New Mexico, doesn't it? A. Yes, sir, it does.

Q. And it—

Presiding Examiner: Would it help things at this point to say that so far all we are talking about is the Southern system?

The Witness: So far we are just talking about the Permian system, Mr. Examiner. The Southern system begins at about the point that he is at now and proceeds west.

Mr. Knight: Yes.

By Mr. Knight:

Q. I believe also your Phillips Goldsmith plant would be included in the part of the line we have been talking about, wouldn't it? A. Yes, sir.

Q. That is they are not separate systems? A. No.

Q. So we come down to Jal No. 1, that is a compressor station, isn't it? A. It is everything.

Q. That is you have a lot of facilities there?

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A. Yes, sir, all types of facilities.

Q. That includes a gasoline plant, too, doesn't it? A. Yes, sir.

Q. Is that in New Mexico or Texas? A. New Mexico.

Q. Yes.

Does more gas flow into the line at that point into El Paso's system? A. Yes, sir.

Q. That gas comes down from your sources up here in Lea County, New Mexico, doesn't it? A. Primarily.

Q. Yes.

Then continuing westward along this five-track system here, we come over to the Eddy County, New Mexico, where we find the Pecos River facilities. A. Sure do.

Q. You have a compression station there? A. Yes, sir.

Q. And a gasoline plant too? A. No, sir.

Q. Dehydration? A. No, sir.

Q. Anything besides compression? A. Just compressor station.

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Q. But some more gas flows into the line at that point, doesn't it? A. Immediately upstream of it.

Q. Yes. When you say "upstream," that is to the right? A. Yes, sir, on Exhibit 6 it would be to the right.

Q. On Exhibit 6, yes, sir.

Then all that commingled gas comes on back down into Texas, into Culberson County and continues in a generally westward or southwestward direction through Hudspeth and continues on westward in El Paso's system? A. That is correct.

Q. And all along the route there gas is being used in El Paso's facilities? When I say "El Paso," I mean El Paso Natural Gas Company as distinguished from El Paso Gas Supply Company. A. Yes.

* * * * * * * * * *

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By Mr. Knight:

Q. Can you keep Lo-Vaca gas from getting into some

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of El Paso's facilities in Texas, Mr. Hunsaker? A. No, sir.

Q. Now, coming back to my previous question, which I will rephrase and perhaps make it more simple: there will be in Texas some El Paso facilities with regard to which no representation is made that any Houston or Lo-Vaca

gas will be as a fuel? A. That question presents a problem to me, Mr. Knight.

Q. How about Dumas? Are you going to use any of that Houston or Lo-Vaca gas in Dumas? A. We are not proposing at present to use it in Dumas, but we do propose to use that 70 million in Texas wherever we can and have to use it.

I think we have indicated a number of plants here which can take up 70 million cubic feet per day, and we have shown that, perhaps for illustration.

I don't know that El Paso is in the position of wanting to be specifically tied right here to these plants.

Q. Mr. Hunsaker, as a practical proposition, isn't this what it boils down to: El Paso is going to buy gas from Houston and Lo-Vaca, that gas is going to be commingled with gas that El Paso buys from other producers as it flows along through the Permian—El Paso's Permian system, and from that commingled stream, El Paso is going

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to get fuel for its facilities; isn't that right? A. Yes.

Q. And some of that commingled stream is going to flow right on out of Texas through New Mexico over to Arizona and right on down to Los Angeles, isn't it? A. A portion of it will.

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Cross Examination

By Mr. Ormasa:

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Q. Now isn't it also true that another source of gas ultimately flowing into Guadalupe starts at Keystone—I refer to Exhibit 7—starts at Keystone and proceeds to

Pecos River, and then from Pecos River into Guadalups? A. Yes, that is correct.

Q. Now that direction of flow would be just as true after the building of the 186169 as before; is that correct? A. Yes, that is correct.

Q. So physically, Houston, Lo-Vaca, and other gas you pick up in Texas would go through that line I just referred to? A. A portion of the commingled stream will do that.

Q. Now turning your attention to volumes for a moment, starting at Guadalupe, does that figure of 5,130,000 cubic feet per day, does that represent the total fuel used at the Guadalupe station? A. Yes, sir.

Q. How is that broken down between the two separate compressor stations? A. We have not broken it down, Mr. Ormasa. The service on the 16-inch OD line would use a small percentage of the total.

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Q. Now at or near El Paso station, will that 16-inch line then physically connect with the lines coming down from Pecos River? A. Yes, sir, it will connect with those lines on the discharge side of El Paso station.

Q. And would it at that point have roughly 90 million cubic feet per day, or in that area? A. Yes, sir.

Q. And that gas—when these two or more lines connect on the discharge side of the El Paso station would it not be a fact that part of the gas coming through the 16-inch line and connecting there will contain physically some of the Houston-Lo-Vaca gas?

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The Witness: May I have the question read?

Presiding Examiner: Yes.

(Question read)

The Witness: That is difficult to answer yes or no. We will, of course, utilize an amount of fuel in excess of the amount we purchase from Houston and that will be metered individually into each station and it will be taken from commingled stream. To the extent we have a commingled stream we will still have the same commingled stream downstream of El Paso station.

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By Mr. Ormasa:

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Q. And can you tell me this as to the general way, as to what percentage of the total Texas source gas you obtain that this Houston, Lo-Vaca gas represents? Rough figures. I don't want any accurate figures. A. Referring to an average day situation?

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Q. Yes. A. If you will permit me to be rough—

Q. Yes, I will, certainly. A. I would imagine that we purchase or produce something in excess of 2.5 billion cubic feet of gas a day in Texas. The Lo-Vaca Houston total will be 170 million. Houston's portion is 70 million. You can make your own division and determine the appropriate percentage.

Q. Thank you.

Now, can you tell me, turning your attention to the Lee County gas in New Mexico, approximately what volumes do you pick up in your line there and deliver on into Texas? A. Pick up where?

Q. Do you pick up gas in Lee County, New Mexico? A. Yes, we do.

Q. Perhaps you can tell me where those stations are that you receive the gas at. A. I am trying to determine

which exhibit to refer you to so that we can see it as we discuss it, Mr. Ormasa.

I believe Exhibit 10 would be the easiest one to follow. In the center of this exhibit you will notice several plants labeled "JAL4, JAL2, JAL3, JAL1", etcetera.

We receive gas from all of these plants of pipeline quality.

At Eunice main line station and Keystone main line

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station, and JAL1 main line station, in varying proportions and quantities of flow with respect to each.

Q. Part of this gas then from the fields in New Mexico goes directly to the Keystone station? A. Yes, sir, Keystone main line.

Q. And that is what is designated on the various exhibits as Keystone ML, is that correct, sir? A. That is correct.

Q. Can you tell me roughly what volume of gas is obtained from Lee County and is transmitted to Keystone main line station?

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The Witness: Well, I think it could vary from nothing to 400 million a day or thereabouts. The average day may be 180 to 200 million cubic feet per day but it does vary tremendously.

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Q. And the flow of gas is generally southward into the Keystone main line? A. Yes.

Q. Does that gas become part of the general gas supply there at the Keystone main line compressor station? A. Yes, it does.

Q. Part of it then from there flows back into New Mexico, is that correct, sir? A. That is—

Q. As part of the commingled gas? A. Well, I would say that all of it flows back into New Mexico.

Q. Is any of it used there at Keystone? A. Keystone requires fuel which may come from that particular line, or the Upton County Line. It may not know the difference because it may be common at this point.

Q. You mentioned that a certain amount of gas also went to the Eunice station? A. Yes, that is correct.

I wonder if I might go back to the last answer and clarify that? I don't want anyone to misunderstand.

When this project goes into operation, the piping

situation at Keystone main line will be arranged so that the supply for the 16-inch O.D. line will come exclusively from sources in Texas. There will be no possible way for Lee County gas to get into that 16-inch O.D. line.

Presiding Examiner: Let me ask one question: Is there any flow of gas south from Northern Natural through Dimmitt, or is that all a north flow? A. That is all north flow, from Plains north. There is never a flow from Plains south. There is or has been and will be a flow from the junction below Plains south.

That is the junction Mr. Ormasa referred to earlier this morning.

By Mr. Ormasa:

Q. I think the pending question, Mr. Hunsaker, refers to volumes that you receive at Eunice from the Lee County fuel. A. Yes, we do receive volumes in varying quantities at Eunice from Lee County.

Q. And that volume then proceeds southerly into Pecos River and then south into Guadelupas station intact? A. That is correct.

Q. Does any of it flow from Eunice northward? A.It won't under this project.

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Q. You have in Exhibits 7 and 8 made certain assumptions to determine where the gas might be used based on your assumptions. Based on the same assumptions, have you determined what the situation would be on a minimum day as

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distinguished from the average day shown in Exhibit 7 and maximum day shown in Exhibit 8?

The Witness: May I have the question re-read?

Presiding Examiner: Will you read the question, please?

(Question read.)

The Witness: No, we have not made a definite determination, Mr. Ormasa. We will undoubtedly have days where our requirements, due to the main line requirements, are less than they would be on the average day. We will have to adjust our intake from Houston accordingly and we know historically what that variation is, and we have certain relationships—factors that we can apply to be on the safe side to be very sure that we take no more gas from Houston that what we burn in those plants on that particular day.

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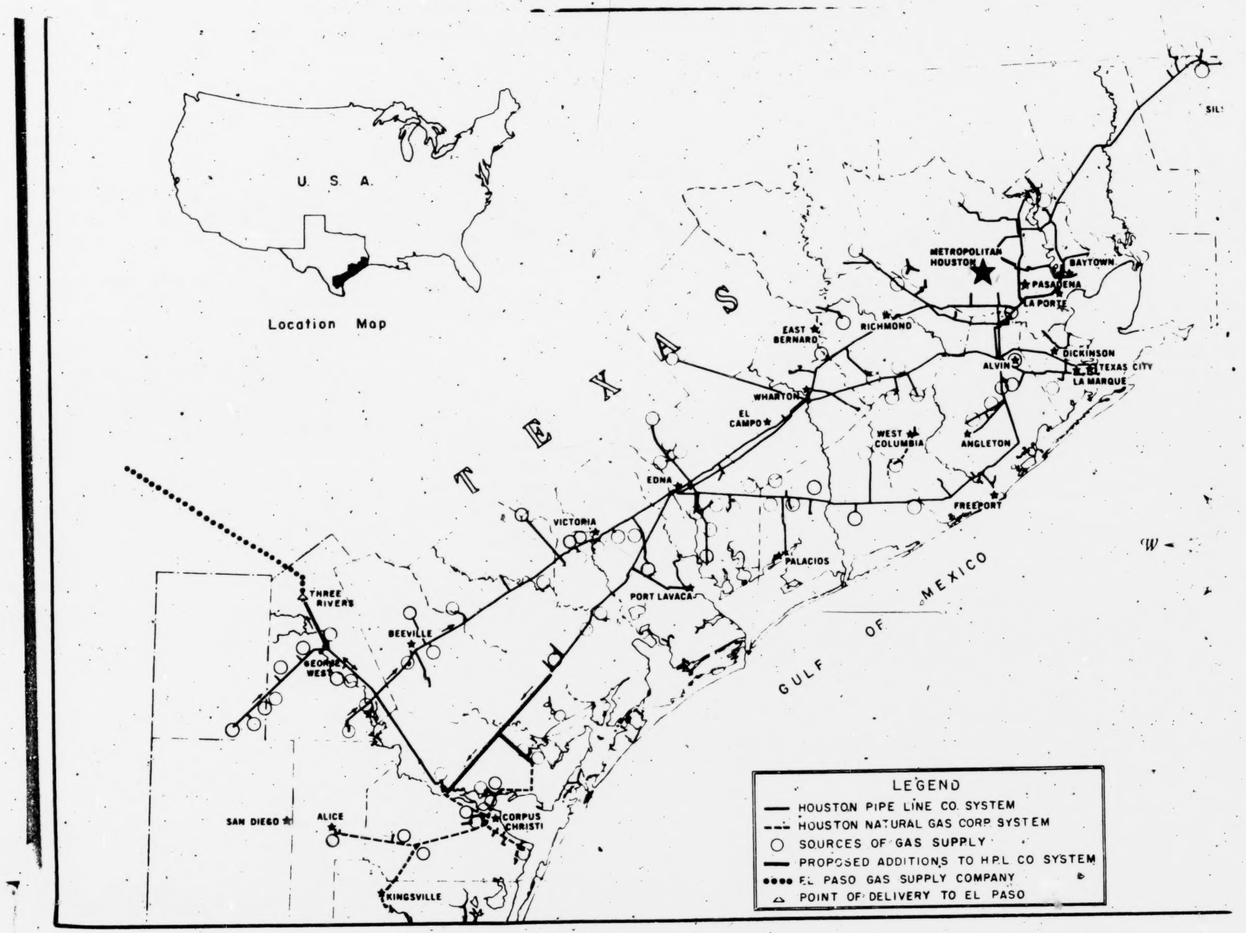

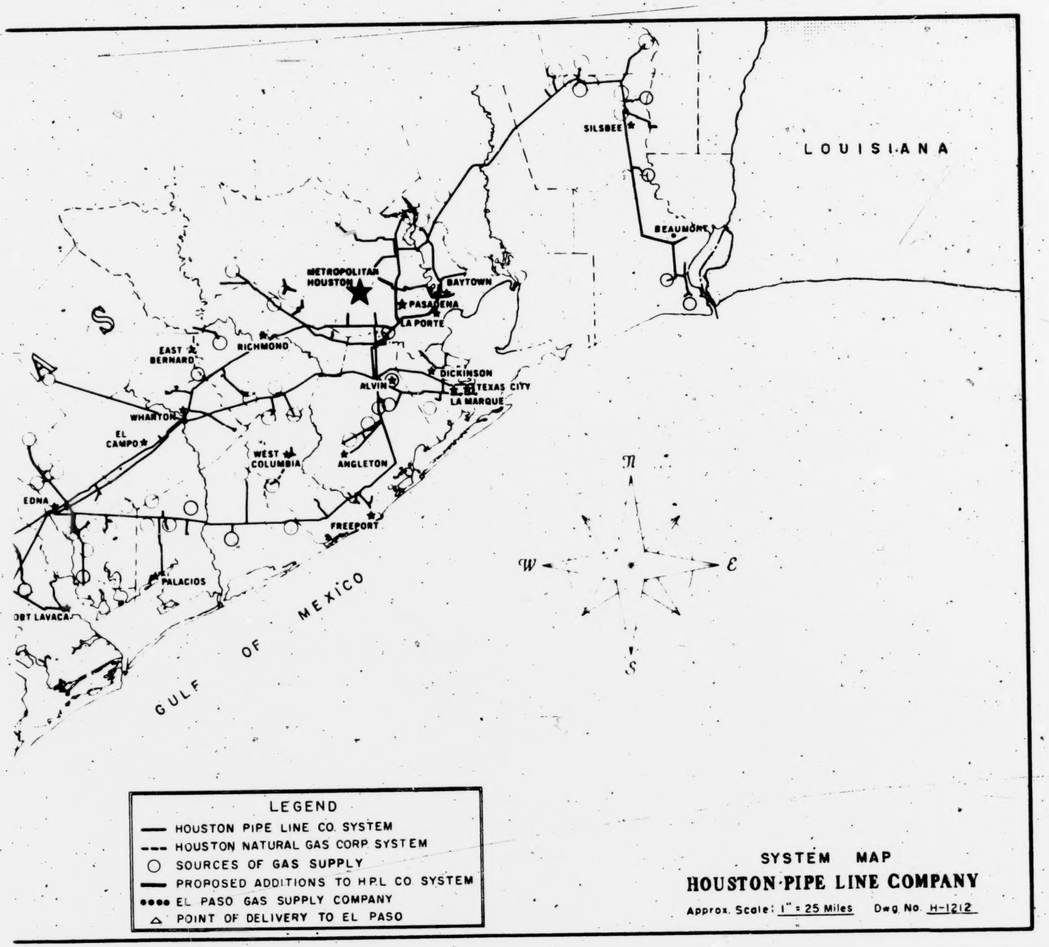

SYSTEM MAP

HOUSTON PIPE LINE COMPANY

Approx. Scale: 1" = 25 Miles Dwg No. H-1212

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Docket No. CP61-177

Exhibit No. 2

Witness: Wimberly

CONTRACT FOR PURCHASE AND SALE OF GAS BETWEEN HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY

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THE STATE OF TEXAS }
COUNTY OF HARRIS }

CONTRACT FOR PURCHASE AND SALE OF GAS

THIS AGREEMENT made and entered into this 19th day of July, 1960, by and between HOUSTON PIPE LINE COMPANY, a Texas corporation, hereinafter called "Houston", and EL PASO NATURAL GAS COMPANY, a Delaware corporation, hereinafter called "El Paso";

WITNESSETH:

WHEREAS, El Paso is engaged in the business of purchasing and gathering natural gas and the transmission and sale of such gas both within and without the State of Texas; and

WHEREAS, El Paso desires to purchase from Houston a supply of natural gas for consumption in the State of Texas as fuel in the operation of El Paso's plant (as hereinafter defined) and for consumption in the State of Texas as fuel

in the operation of a certain gasoline plant hereinafter referred to; and

WHEREAS, Houston has a supply of natural gas available for sale and delivery to El Paso for such fuel purposes, and Houston and El Paso desire to enter into an agreement to accomplish such sale in the particulars contained herein.

NOW, THEREFORE, in consideration of the mutual covenants, agreements and representations contained herein, the parties hereto mutually agree as follows:

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ARTICLE I. DEFINITIONS.

The following words and terms, whenever used or appearing in this agreement shall have the following meaning:

(a) The term "day" shall mean a period of twenty-four (24) consecutive hours beginning at eight o'clock A.M. Central Standard Time on each calendar day and ending at eight o'clock A.M. Central Standard Time on the following calendar day.

(b) The term "month" shall mean the period beginning on the first day of each calendar month at eight o'clock A.M. Central Standard Time and ending on the first day of the next calendar month at eight o'clock A.M. Central Standard Time.

(c) The term "contract year" shall mean an annual period of twelve (12) consecutive months commencing on the first of the month next following the date of first deliveries hereunder. Each such annual period shall constitute a contract year under this contract.

(d) The term "date of first deliveries" shall mean that date following the testing and completion of the facilities

of both Houston and El Paso on which gas is first delivered by Houston into El Paso's facilities.

(e) The term "cubic foot of gas" shall mean the amount of gas contained in a cubic foot of space at a pressure of fourteen and sixty-five one hundredths pounds per square inch absolute (14.65# psia) and at a temperature of sixty degrees Fahrenheit (60°F.).

(f) The term "MCF" shall mean one thousand (1,000) cubic

feet of natural gas as determined on the measurement basis set forth in this agreement.

(g) The term "BTU" shall mean British thermal unit, and such term shall also mean British thermal units when used herein to indicate more than one such unit; and the term "gross BTU content" shall mean the number of BTU produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of one (1) cubic foot at a temperature of 60° Fahrenheit if saturated with water vapor and at a pressure of fourteen and sixty-five hundredths (14.65) pounds per square inch absolute (p.s.i.a.) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of gas and air, and when the water formed by combustion is condensed to the liquid state. Whenever the words "gross BTU content" are used herein, such words shall be deemed to mean gross BTU content as above defined.

(h) The term "annual load factor" as to any contract year shall be a fraction the numerator of which is the annual mathematical average delivery per day by Houston to El Paso during the contract year and the denominator

of which is the total delivery by Houston to El Paso on the peak day during the same contract year.

(i) The term "El Paso's plant" shall mean all facilities situated within the State of Texas now or hereafter owned and operated by El Paso in connection with its gas transmission pipe line system which consume gas as fuel, including, but not limited to, compressors, engines, boilers, treating plants, gas processing plants and camps.

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ARTICLE II. LIMITATIONS AND COVENANTS.

2.1 It is recognized that the construction by El Paso of a separate network of service pipe lines running to the various components of El Paso's plant located in Texas for delivery of gas for fuel purposes would be unnecessary duplication of facilities and economically prohibitive. Accordingly, it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. El Paso shall advise Houston as to each such utilization to be made of the gas purchased hereunder, and no new or different utilization of such gas shall be made by El Paso without the prior written consent of Houston. El Paso further covenants and agrees that at no time during the term of this agreement will El Paso take from Houston a quantity of gas in excess of the quantity of gas being consumed at the same time in Texas by El Paso for uses agreed to hereunder by Houston. If, by inadvertence or mistake or for any other reason, El Paso

shall at any time during the term hereof take from Houston hereunder a greater quantity of gas than is being so utilized, El Paso covenants that the same shall be sold or utilized by El Paso solely in intrastate commerce for use and consumption within the State of Texas.

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2.2 El Paso covenants that all components of El Paso's plant consuming fuel gas hereunder shall physically be located on its system of pipe lines and laterals within the State of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the originating delivery point defined hereunder. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volume of gas contributed into the commingled stream at Three Rivers by Houston. El Paso agrees to retain for a period of six (6) years and on demand will supply meter reading charts taken from meters at such points as may be necessary to enable proof to be made of the foregoing described continuous flow of gas.

2.3 On or before May 15, 1960, El Paso shall apply for, and thereafter pursue with due diligence until obtained or denied, a Certificate of Public Convenience and Necessity from the Federal Power Commission authorizing the construction of facilities necessary to transport the gas to be purchased hereunder running from the delivery point hereinafter designated to El Paso's pipe line system in the Permian Basin Area of West Texas. This contract and all amendments and supplements thereto, if any, shall be made a part of such application. Houston shall cooperate with El Paso in furnishing information necessary to reflect

to the Federal Power Commission that the quantities of gas which will be necessary to satisfy Houston's obligations under this agreement are available to Houston.

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All expenses in connection with the preparation and presentation of such information (other than expenses ordinarily incurred by Houston in the normal operation of its business) shall be borne by El Paso.

ARTICLE III. CONDITIONS AND RIGHTS TO TERMINATE.

3.1 The obligation of Houston to sell gas under this agreement shall be subject to the following conditions:

(a) The order granting the Certificate of Public Convenience and Necessity referred to in Section 2.3 hereof shall have expressly recognized that the sale contemplated by this agreement is an intrastate transaction and, with respect to gas to be sold hereunder for use by El Paso in El Paso's plant, a sale for use and not for resale, and will not subject Houston or independent producers selling gas to Houston to the jurisdiction of the Federal Power Commission.

(b) In the event that El Paso shall receive a Certificate of Public Convenience and Necessity which shall fail, in the opinion of Houston's general attorneys, to expressly recognize that the sale contemplated by this agreement is an intrastate transaction, and, with respect to gas to be sold hereunder for use by El Paso in El Paso's plant, that it is one of direct sale not for resale, then Houston shall have the right to proceed independently before the Federal Power Commission to obtain a ruling satisfactory to it in this respect.

3.2 Houston shall have the right to terminate this agreement on the happening of any of the following contingencies:

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(a) If the certificate referred to in Section 2.3 is denied by the Federal Power Commission, this agreement shall terminate upon the date the order denying such certificate becomes final.

(b) If the certificate referred to in Section 2.3 is not granted and accepted on or before September 1, 1960, Houston shall thereafter have the right to give thirty (30) days' prior written notice to El Paso of its intention to cancel this agreement, and if such certificate is not granted and accepted prior to the expiration of such thirty (30) day period this agreement shall thereupon terminate.

(c) Houston has already received from Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski an opinion dated February 1, 1960 to the effect that the sale contemplated by this agreement is an intrastate transaction and will not subject Houston or independent producers selling gas to Houston to the jurisdiction of the Federal Power Commission. If at any time prior to the granting of the Certificate of Public Convenience and Necessity referred to in Section 2.3 above, Houston shall have received from Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski an opinion that legislation, Federal Power Commission decision or judicial action requires a withdrawal or material revision of that opinion, this agreement shall terminate upon written notice of such opinion by Houston to El Paso.

(d) If the certificate referred to in Section 2.3 is granted but nevertheless is conditioned upon any revision of the price of gas to be sold or delivered hereunder or any other

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substantial revision of this agreement, Houston shall have the right to terminate this agreement by giving written

notice of cancellation to El Paso and this agreement shall terminate upon receipt of such notice by El Paso.

(e) If the certificate referred to in Section 2.3 is granted but, in the opinion of Houston's general attorneys (such opinion to be rendered not later than fifteen (15) days after issuance and receipt by Houston of such certificate), does not expressly recognize that the sale contemplated by this agreement is wholly an intrastate transaction, and, with respect to gas to be sold hereunder for use by El Paso in El Paso's plant, that it is one of direct sale not for resale, and will not subject Houston or independent producers selling gas to Houston to the jurisdiction of the Federal Power Commission, Houston will have the right (notwithstanding Houston's right at its election to attempt to obtain a ruling satisfactory to it in this respect) to give written notice of termination to El Paso, at any time prior to issuance of an amended ruling or order by the Federal Power Commission recognizing the foregoing matters, and this agreement will immediately terminate upon receipt by El Paso of such notice of termination from Houston.

3.3 If the certificate referred to in Section 2.3 hereof is denied, or is granted but with significant changes of substance, or with conditions which require revision of the provisions of the agreements between El Paso and the independent producers or others supplying gas for the proposed facilities, El Paso shall have the right to terminate this agreement by giving written notice of

cancellation to Houston and this agreement shall terminate upon receipt of such notice by Houston.

ARTICLE IV. DELIVERY POINT AND FACILITIES.

4.1 The gas shall be delivered by Houston to El Paso at a site in the immediate vicinity of Three Rivers, Texas, to

be mutually agreed upon by Houston and El Paso. El Paso shall construct, with due diligence and at its risk and expense, all facilities necessary to enable El Paso to accept delivery of gas hereunder at said point of delivery.

4.2 Houston shall install, operate and maintain at said delivery point (at its cost and expense) all pipes, meters and other equipment necessary, in Houston's opinion, to measure the volume of gas delivered hereunder, and such facilities shall remain the personal property of Houston. El Paso may, at its option, install and operate (at its cost and expense) immediately downstream from the point of delivery such measuring equipment of standard type as will enable El Paso to check the volume of gas delivered to El Paso and measured by Houston's measuring equipment, and such check measuring facilities shall remain the personal property of El Paso.

4.3 The point of delivery for all gas delivered hereunder shall be at the outlet meter station header of Houston's meter station at the point of connection with El Paso's pipe line facilities. For the purpose of determining liabilities of the parties hereunder, El Paso shall take title to and responsibility for the gas at such

point of delivery. El Paso shall have no responsibility for the condition or operation of Houston's facilities upstream of said delivery point and Houston shall have no responsibility for the condition or operation of El Paso's facilities downstream of said delivery point.

ARTICLE V. QUANTITIES.

5.1 Subject to the terms, limitations and conditions of this contract, and specifically, subject to the terms set forth in Articles II, III and XVII hereof, Houston agrees

to sell and deliver to El Paso and El Paso agrees to purchase and take from Houston, if available, or pay for if available but not taken, during the term of this contract one thousand (1,000) MCF of gas each day, provided that so long as either (1) the Federal Power Commission or successor or similar United States governmental board, bureau or commission or other body performing similar functions does not have jurisdiction under the Natural Gas Act or similar or successor statute over the sale hereunder, or (2) Houston is willing to deliver the "annual contract quantity", as defined below in this Section 5.1, despite such jurisdiction in such body pursuant to such statute, then subject to the terms, limitations and conditions of this contract, Houston agrees to sell and deliver to El Paso and El Paso agrees to purchase and take from Houston, or to pay for if available but not taken, during each contract year of the term of this contract an "annual contract quantity" of 25,550,000 MCF of gas. If requested by El Paso, Houston may sell and deliver to

El Paso in excess of the annual contract quantity during any contract year, but Houston will not be obligated to sell or deliver in excess of the annual contract quantity to El Paso during any contract year except (and only) to the extent that El Paso may be entitled to receive "make-up" gas during such contract year under the provisions of Section 5.5 hereof.

5.2 El Paso shall endeavor to take the annual contract quantity during each contract year as nearly as practicable at uniform hourly and daily rates of flow (of approximately 70,000 MCF per day), but shall have the limited right to vary the daily rate of flow subject to the provision and limitation that such variations shall not be permitted to cause the "annual load factor" on deliveries by Houston

to El Paso to be less than 91/100ths for any contract year, and subject to the further limitation that Houston shall never be required to deliver at a rate in excess of 77,000 MCF of gas per day.

5.3 At the end of each contract year of the term hereof, if the quantity of gas taken by El Paso should be less than the annual contract quantity which El Paso is obligated to take under the preceding Section 5.1 (less any portion of such deficiency in takes excused by the other provisions of this agreement), then Houston shall render a statement to El Paso for the amount of such deficiency based upon the weighted average price paid by El Paso hereunder for gas during the contract year in which such deficiency occurred. Such statement for deficiency in takes shall be rendered by Houston to El Paso as soon as practicable after the end of such

contract year and within two (2) months thereafter, and El Paso agrees to pay Houston the amount of said statement within one (1) month after receipt thereof, or such rendition and payment may be made at such other times as the parties may agree hereafter.

5.4 El Paso shall make and transmit to Houston short term forecasts from time to time of the volumes of gas which El Paso will take hereunder during the periods covered by such forecasts. Such forecasts will usually be made by El Paso's dispatcher and may be transmitted to Houston either orally or in writing and in any pretical manner, including telephone, telegraph, through the mails or in person. Any such forecast shall be subject to change at any time by a subsequent forecast transmitted to Houston. Upon receipt of each such forecast Houston shall endeavor to deliver gas to El Paso in accordance therewith, but if Houston shall be unable, after reasonable notice, to deliver

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the daily quantity of gas called for in any such forecast (which quantity shall not exceed delivery at a rate of 77,000 MCF per day), then, in such event:

(a) The annual contract quantity which El Paso is obligated to take during the then current contract year shall be reduced by an amount equal to the deficiency between the aggregate quantities of gas so requested by El Paso during the period of such inability and the aggregate quantities of gas actually delivered by Houston to El Paso during such period; and

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(b) In computing the "annual load factor" on deliveries by Houston to El Paso during the then current contract year, it shall be deemed that the daily quantities so requested by El Paso were delivered hereunder for each day of the period of such inability, rather than the daily quantities actually delivered by Houston to El Paso during such period.

As an example of the operation of the provisions of this Section 5.4, if Houston is notified that El Paso desires to take the maximum required daily rate of 77,000 MCF and Houston can deliver only 70,000 MCF per day for three (3) days before the total required deliverability is restored, then the annual contract quantity for the then current contract year would be reduced by 21,000 MCF (i.e., a daily failure of deliverability of 7,000 MCF, for a period of three days).

5.5 Subject to the limitation hereafter set out, if the quantity of gas taken by El Paso hereunder during any contract year of the term hereof, for reasons not excused by the provisions of this contract, should be less than the annual contract quantity of gas El Paso is obligated to take during such contract year under the provisions of this

agreement, and El Paso is thereby required to pay Houston under the provisions of Section 5.3 for a quantity of gas which El Paso has not in fact taken, then El Paso may make up such deficiency in takes as "make-up" gas during the next three succeeding contract years of the term hereof, but not

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thereafter, by receiving gas during any such contract year in excess of the annual contract quantity of gas El Paso is obligated under the terms hereof to take during such contract year. After the annual contract quantity El Paso is obligated to take hereunder has been taken in any contract year, all gas taken thereafter during such contract year shall be considered make-up gas to the extent El Paso has theretofore paid for gas not taken which it has an unexpired right to make up under the provisions of this contract. With respect to all such make-up gas, the parties shall determine the price which would have been payable for an equivalent quantity of gas sold by Houston to El Paso hereunder under the pricing provisions of Article X and the tax reimbursement provisions of Article XI as of the month during which such make-up gas is actually taken; and if such resulting price (including tax reimbursement) is the same as or less than the price theretofore paid to Houston at the end of the contract year during which such deficiency occurred, no further payment shall be made to Houston by El Paso, but if such resulting price (including tax reimbursement) is greater than such price theretofore paid to Houston for gas not taken, El Paso shall pay such difference to Houston at the time of the next regular monthly billing. In the above computations, the amounts previously paid by El Paso for gas not taken (and which El Paso has an unexpired right to make up) shall be applied on a first-in first-out basis in determining whether any payment is due with respect to make-up gas.

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5.6 Notwithstanding the provisions of Section 5.1 above, it is agreed that during any period when El Paso is render wholly

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or partially unable to take gas which would otherwise be delivered to El Paso hereunder, by reason of the operation of the porvisions of Article XIV hereof then in each such event, at the end of the then current contract year:

(a) The "average hourly deliveries" during said contract year shall be determined by dividing the sum of a number equal to the aggregate quantity of MCF of gas actually delivered to El Paso hereunder during such contract year plus a number equal to the aggregate quantity (if any) of MCF by which the annual contract quantity during such contract year is reduced by virtue of the provisions of Section 5.4 above, by a number equal to the aggregate number of hours during said contract year when gas was actually being delivered hereunder.

(b) In the event that El Paso has been rendered wholly unable to take gas by reason of the operation of the provisions of Article XIV hereof, then for each hour during which such inability shall continue, the annual contract quantity of gas which El Paso is required to take during the then current contract year shall be reduced by an amount equal to the "average hourly deliveries" during such contract year.

(c) In the event that the ability of El Paso to take gas has been partially impaired by reason of the operation of the provisions of Article XIV hereof, then for

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each hour during which such impairment shall continue, the annual contract quantity of gas which El Paso is

required to take during the then current contract year shall be reduced by an amount equal to the deficiency between the "average hourly deliveries" during such contract year and the quantity of gas actually taken by El Paso during such hour.

ARTICLE VI. PRESSURE AND QUALITY.

6.1 The gas to be delivered by Houston to El Paso hereunder shall be delivered at such varying pressures as El Paso may require; provided, however, Houston shall not be obligated to deliver at any time hereunder at a pressure in excess of five hundred fifty pounds (550#) per square inch gauge.

6.2 All gas delivered shall be natural gas containing not more than one and one-half (1½) grains of hydrogen sulphide nor more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, nor more than three per cent (3%) by volume of carbon dioxide. Said gas shall have a BTU content of not less than nine hundred fifty (950) BTUs per cubic foot and shall be reasonably free from objectionable liquids and foreign matter.

ARTICLE VII. MEASUREMENT.

7.1 The volume of gas measured hereunder shall be computed for all purposes of this contract as follows:

(a) The atmospheric pressure shall be assumed to be 14.65 psia. at the point of measurement irrespective of the actual atmospheric pres-

sure at the point of measurement from time to time.

(c) For positive displacement meter measurement, the specifications, coefficients, factors, and calculations shall be those prescribed by or in the A.G.A. Gas

Measurement Committee Report No. 3. For all gas measured at a pressure of less than 500 psig., the manometer factor will be assumed to be unity.

(c) For positive displacent meter measurement, the installation specifications, methods of testing, factors, and calculations shall be those prescribed by or in the American Meter Company's Handbook E-4.

7.2 For orifice meter measurement, the deviation of the gas from Boyle's Law at the pressures, temperatures, and specific gravities under which the gas is delivered shall be read from the A.G.A Convenient Operating Tables of "Supercompressibility Factors of Natural Gas". No adjustment for diluents, based upon a chemical analysis of the gas involved, shall be made to these factors if the adjustments amount to less than two-tenths of one per cent (.2%) plus or minus from the A.G.A. Hydrocarbon Tables. For measurements using positive displacement meters, the factor to be used will be the square of the above named factor. If the conditions of pressure, and or diluents in the gas are not within the range of these tables, then other accepted methods mutually agreed upon by Houston and El Paso shall be used in determining the deviation from Boyle's Law.

7.3 The flowing temperature of the gas being metered shall be determined continuously during periods when gas is being delivered, by means of a recording thermometer of standard make acceptable

to both parties, and the arithmetical average of the temperature recorded during periods of flow only shall be deemed the gas temperature, and shall be used in computing the volumes of gas delivered hereunder.

7.4 The specific gravity of the gas delivered hereunder shall be determined by a recording gravitometer of approved type, or such other method as may be agreed upon by both parties.

7.5 When a recording gravitometer is used, the arithmetical average of the gravity recorded during periods of flow only shall be used for computation purposes for each chart period.

ARTICLE VIII. METER TEST.

8.1 At least once a month and so far as convenient and practicable, upon the corresponding days of each month, Houston shall calibrate its orifice meters and appurtenant instruments, and at least once each three months, Houston shall calibrate its positive displacement meters, all in the presence of representatives of El Paso, as hereinafter provided, and the parties shall jointly observe any adjustment made. If the aggregate error in these measuring devices is found on test to register not more than two per cent (2%) in volume fast or slow, they shall be deemed to be correct. All the measuring devices mentioned above shall be adjusted upon test to register accurately within the tolerances allowed by their respective manufacturers. In the event that the aggregate error in these measuring devices is more than two per cent (2%) fast or slow in volume, adjustments shall be made by applying the percentage of error to the volume involved during the time the

metering equipment was out of calibration if this period can be ascertained. If the time when the metering equipment got out of calibration cannot be ascertained, then the percentage of error will be applied to the volume delivered for one-half (½) the time elapsed since the date of the last calibration. During the time any meter is out of re-

pair or is being tested, or in the event of a sudden failure of any meter to register accurately for any period, within the two per cent variation allowed herein, if it is not feasible to install another meter, the volume of gas passed shall be estimated until a new or repaired meter is installed, and adjustment and settlement shall be made at the regular monthly periods on the basis of the amount of gas registered at like pressures and for like periods of time when the meter was registering accurately.

8.2 If El Paso shall exercise its right of installing and operating check meters as authorized by Section 4.2, then, in the event and only in the event of failure of the meters of Houston to register accurately at any time (allowing for the variations above mentioned), the registration of the meters of El Paso, instead of the estimated quantities above provided for, shall be taken as the correct quantity of gas delivered (provided that the meters of El Paso are correct within the above variations) until such time as the meter or meters of Houston shall be adjusted, repaired or replaced. The meters of El Paso hereunder shall be tested and adjusted and the charts therefrom shall be handled and preserved by El Paso in the same manner as is herein provided with respect to meters of Houston, and Houston shall be entitled to

have access to El Paso's meters at all reasonable times in the presence of El Paso's representatives.

8.3 Each party shall give the other party notice of the time of all tests of meters and appurtenant instruments sufficiently in advance of the holding of the tests so that the other party may conveniently have its representatives present; provided, however, that if either party has given such notice to the other party and the other party is not present at the time specified, then the party giving the

notice may proceed with the tests as though the other party were present.

ARTICLE IX. HEAT CONTENT.

9.1 The gross BTU content of the gas delivered hereunder shall be determined by a recording calorimeter of approved type, or by such other method as may be agreed upon by both parties, so located as to measure properly the heat content of the gas delivered.

9.2 When a recording calorimeter is used, the arithmetical average of the recordings during periods of flow only shall be used for computing purposes for each chart period.

9.3 In determining the BTU per cubic foot to be used for the purpose of computing billing hereunder, the gross BTU content of the gas thus obtained shall be corrected from the water vapor content of the gas under testing conditions to the average water vapor content of the gas being delivered.

9.4 The degree of saturation by water vapor of the gas delivered hereunder shall be determined at least once a month on

a day as near the first (1st) day of the month as practicable.

9.5 Nothing herein provided shall be construed as obligating El Paso to accept gas containing less than nine hundred and fifty (950) BTU per cubic foot, and the purchase obligation of El Paso hereinabove provided may, at El Paso's election, be proportionately suspended and inoperative during any period while gas having a BTU content of less than 950 BTU per cubic foot is tendered by Houston to El Paso for acceptance, but in the event that El Paso should elect to accept such gas, the purchase obligation of

El Paso shall remain unchanged and payment shall be made therefor at the price herein fixed. The provisions of this section shall not be construed as relieving Houston of its obligation to deliver gas under the provisions of this agreement having a BTU content as stated in Section 6.2 hereof.

ARTICLE X. PRICE.

10.1 The unit of sale for all natural gas sold and delivered during the term of this agreement shall be one million (1,000,000) BTU, as determined in accordance with the provisions of Article IX hereof.

10.2 Subject to the adjustments herein provided, the unit price for each one million (1,000,000) BTU of natural gas delivered under the terms of this contract during each month shall be an amount equal to the sum of the amounts specified in paragraphs (a), (b) and (c), to wit:

(a) the fixed sum of six and one-eighth cents (6⅛¢);

PLUS

(b) Houston's "weighted average cost per MCF" (as hereinafter defined) applicable for such month;

PLUS

(c) Any increased price per 1,000,000 BTU required to be paid under the provisions of Section 10.4 below.

10.3 Houston's "weighted average cost per MCF" as used herein shall mean Houston's weighted average cost per MCF of gas in the preceding month with respect to all of the various sources of supply of Houston from which it purchased or received gas during that month, without regard to whether such sources of supply of Houston

provide gas for sale and delivery to El Paso hereunder. Houston's weighted average cost shall be its weighted average cost for one thousand (1,000) cubic feet of gas measured at sixty degrees Fahrenheit (60°F.) temperature and 14.65 pounds per square inch absolute pressure, adjusted for deviation from Boyle's Law. Houston's "weighted average cost per MCF" for the month of October, 1959, computed in accordance with the foregoing, was 13.375¢ per MCF. Accordingly, the price for each one million BTU delivered in accordance with this agreement during the billing month of November, 1959, would have been 19.5¢. Corrected billings shall be rendered by Houston to El Paso and paid by El Paso or refunded or credited

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by Houston, as the case may be, in each instance in which the actual and ultimate weighted average cost of Houston with respect to a particular calendar month shall be determined to be at variance with the weighted average cost of Houston with respect to such month theretofore made the basis of billing and payment hereunder. El Paso shall at all reasonable times have the right to inspect and check in the offices of Houston the records and calculations of Houston pertaining to the determination of such weighted average cost.

10.4 The price for each one million (1,000,000) BTU of gas sold during each billing month hereunder shall be increased, or decreased, as the case may be, at the rate of two mils ($.002) for each twenty-five cents ($.25) increase or decrease after December 31, 1959, in the arithmetical average of the "Average Hourly Gross Earnings" of non-supervisory employees and production workers of the Fabricated Metal Products Group and of the Gas and Electric Utilities Group compiled by the United States

Department of Labor, Bureau of Labor Statistics, and officially reported on a monthly basis by the United States Department of Commerce, Office of Business Economics, in a publication currently entitled "Survey of Current Business"; provided, however, that no decrease or decreases in said "Average Hourly Gross Earnings" shall ever operate under the terms of this contract to reduce the price for each one million (1,000,000) BTU below the price of six and one-eights cents (6⅛¢) plus Houston's "weighted average cost per MCF" as defined in Section 10.3. A base "Average Hourly Gross Earnings" figure shall be

determined by (1) weighting equally the figures reported monthly as "Average Hourly Gross Earnings" of the said Fabricated Metal Products Group and the Gas and Electric Utilities Group and (2) averaging such monthly reported figures for the six (6) month period ending nearest to December 31, 1959.

"Average Hourly Gross Earnings" figures shall be computed on a comparable basis for each six months period ending the first and third quarters of each calendar year. Variations of said "Average Hourly Gross Earnings" from the base figure shall be applied (by use of the formula provided in the next paragraph) to adjust the price herein in the corresponding six-month period of the next following year.

The formula to be used for adjustment as a result of variations from the base figure shall be the product of two mils times a fraction the numerator of which is the variation from the base figure and the denominator of which is twenty-five cents ($.25).

Such computation shall be calculated to the nearest one hundredth of a mil.

Corrected billings covering the appropriate period or periods shall be rendered by Houston to El Paso and paid by El Paso or refunded or credited by Houston, as the case may be, for each month in which a retroactive revision of the previously reported "Average Hourly Gross Earnings" is published at variance with figures previously applied.

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ARTICLE XI. TAXES

11.1 With respect to all gas sold and delivered by Houston to El Paso hereunder, El Paso contracts to pay unto Houston, in addition to the other sums payable to Houston under this contract, the full amount of any new or additional or increased or subsequently applicable production, distribution, sales, excise, gross receipts, severance, use, occupation, gathering, transportation, street rental, license, transmission or any other taxes or charges of every kind and character (excepting ad valorem, franchise, excess profits and income taxes), whether of a nature similar to those specifically enumerated or of an entirely different character, levied, assessed, fixed or charged by any municipal or governmental authority against Houston or its business in connection with or attributable to or allocable to the volume, value or gross receipts from the sale or delivery or handling of gas delivered to El Paso hereunder or against such gas itself or the act, right or privilege of the ownership, production, severance, handling, transmission, compression, distribution, sale or delivery of such gas, whether such tax or charge be based upon the volume, value or gross receipts from the sale or delivery or handling of such gas, or upon some other basis, to the extent that such taxes or charges (if they represent increases of taxes existing and in effect on the date specified hereinafter) shall exceed those being paid by Houston as of December 15, 1959, or (if such taxes

or charges are new or different taxes or charges not in existence or in effect as of the date hereinafter specified—as distinguished from increases in existing taxes in effect on such

date) to the full extent of such additional taxes or charges imposed or becoming effective after December 15, 1959. No reimbursement shall be made to Houston under the provisions of this Article from El Paso for any taxes included in Houston's "weighted average cost per MCF", as said term is used in Article X of this agreement.

11.2 The amount of such taxes or charges for which payment is due hereunder shall be billed by Houston to El Paso monthly or at the end of each contract year, at the election of Houston, and shall be paid by El Paso to Houston, at Houston, Texas, within fifteen (15) days after receipt of such billing.

ARTICLE XII. BILLING AND PAYMENT.

12.1 Houston shall, on or about the tenth (10th) day of each calendar month, render a statement to El Paso showing the quantity of gas and the number of BTU delivered at the point of delivery hereunder to El Paso during the preceding calendar month and the amount payable therefor by El Paso, together with any other amounts payable to Houston under the provisions of this contract. El Paso agrees to pay Houston at Houston, Texas, the full amount payable according to such statement within fifteen (15) days following receipt thereof by El Paso. At the end of each contract year or other appropriate period specified herein, Houston shall also submit to El Paso an appropriate statement for any defficiency in required takes by El Paso hereunder, in accordance with the terms hereof.

12.2 All meter charts, when removed from the meters of

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Houston, shall be forwarded to Houston's office for computation and check, where they shall be placed in permanent files. Should El Paso elect to check or inspect said charts after they have been placed in such permanent files, Houston shall forward said charts to El Paso as may be directed for check and inspection, and El Paso shall promptly make such check and inspection and shall return said charts to be kept in said permanent files for the future reference of both parties hereto for a period of two (2) years after the end of the period to which such charts relate. Similarly, El Paso shall forward to El Paso's office all meter charts when removed from the check meters of El Paso, and retain same for reference and inspection by Houston in like manner.

ARTICLE XIII. TERM.

13.1 This contract, unless sooner terminated in accordance with the provisions hereof relating to cancellation and termination, shall exist for a period of twenty (20) contract years, commencing on the first (1st) of the month next following the date of first deliveries hereunder; provided, that first deliveries of gas hereunder shall commence as soon as El Paso shall have completed construction of its facilities referred to in Article IV hereof, following issuance of a Certificate of Public Convenience and Necessity acceptable to the parties hereto (as provided in Article III hereof), and in any event not later than two hundred and ten (210) days after the issuance of such acceptable certificate, delays due to force majeure alone excepted. It is agreed that as to any gas

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delivered by Houston to El Paso hereunder prior to the beginning of the first contract year such gas shall be deemed

to have been delivered during the first contract year of the term hereof. Unless otherwise agreed to in writing by Houston and El Paso, this agreement shall automatically continue in force from year to year after the expiration of the term hereof, subject to termination at the option of either party hereto upon the giving of ninety (90) days' written notice to the other party.

ARTICLE XIV. FORCE MAJEURE.

14.1 In the event that either party is rendered unable, wholly or in part, by force majeure or other causes herein specified, to carry out its obligations under this contract other than the obligation to make payments of amounts due hereunder, it is agreed that on such party's giving notice and reasonably full particulars of such force majeure in writing or by telegraph to the other party within a reasonable time after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure or other causes herein specified, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch.

14.2 The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms,

floods, washouts, arrests and restraints of the government, either federal or state, civil or military, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of natural gas wells or gas supply, depletion of gas

reserves, and any other causes, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension, and which by the exercise of due diligence such party is unable, wholly or in part, to prevent or overcome. Such term shall likewise include (1) in those instances where either party hereto is required to obtain servitudes, right-of-way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such servitudes, right-of-way grants, permits or licenses, and (2) except as provided in Articles II, III and XVII of this agreement, in those instances where either party is required to furnish materials and supplies for constructing or maintaining facilities or is required to secure permits or permission from any governmental agency, federal, state or municipal, civil or military, to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies, permits and permissions. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the

discretion of the party having the difficulty and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the party having the difficulty.

14.3 It is understood that either party may, without liability to the other party, interrupt the operations of its pipeline system for the purpose of making necessary

alterations or repairs thereto, but that such interruption shall be for only such time as may be reasonable. The party interrupting operations shall give the other party reasonable notice, except in case of emergency, of its intention so to interrupt operations and of the estimated time during which no gas will be taken or delivered, as the case may be.

ARTICLE XV. IMPAIRMENT OF DELIVERIES.

15.1 It is recognized that Houston delivers gas to gas utilities for resale to domestic consumers. In the event a shortage of gas renders Houston unable to supply the full gas requirements of all its customers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Houston, and the remaining available gas shall be prorated by Houston among its other customers, including El Paso.

15.2 If as a result of the proration of gas by Houston pursuant to the provisions of Section 15.1 of this Article the

average daily quantity of gas available for delivery hereunder by Houston to El Paso shall be reduced for as long as three consecutive months below 70,000 MCF per day, the respective obligations of Houston to sell and deliver gas to El Paso and of El Paso to purchase and receive gas from Houston, or pay for the same whether or not received, shall, at El Paso's election, be reduced for the remaining term of this agreement in the proportion that the average daily quantity of gas available for delivery by Houston to El Paso hereunder during such three months period shall bear to 70,000 MCF. The right granted to El Paso in this section may be exercised by El Paso each time any such

reduction shall occur as the result of proration of gas by Houston pursuant to the provisions of Section 15.1 of this Article.

ARTICLE XVI. TRANSPORT GAS.

16.1 Houston may, at its option, arrange for El Paso, or its nominee, to purchase gas for transportation or exchange under this agreement. The quantity so taken into Houston's system from El Paso shall be replaced by an equivalent quantity delivered at the delivery point provided in Article IV of this agreement. All cost, risk and expense in connection with taking such gas into Houston's system shall be borne by Houston, and subject to El Paso's taking the quantities agreed to in Article V of this agreement, Houston shall be responsible for taking the minimum quantities agreed to be taken under any such contract. During each billing period Houston will credit El Paso with the amount paid by El Paso

for gas purchased and delivered to Houston as transport gas during such billing period. It is expressly agreed that Houston shall have the right and power, in its sole discretion and at its election, at any time and from time to time prior to or at the termination of this contract, without cost to Houston, to require an immediate assignment or re-assignment from El Paso (or El Paso's nominee) to Houston, or Houston's assignee or nominee, of all or any share of, or undivided interest in, the right, title and interest of El Paso (or El Paso's nominee) in, to and with respect to any one or more or all of any gas purchase contracts held by El Paso (or El Paso's nominee) for the purchase of transport gas under the foregoing provisions of this Section 16.1; additionally, Houston shall be obligated and required to accept (either in its own name or in the name of some nominee by Houston) a re-assignment

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or assignment from El Paso (or its nominee) of any or all such purchase contracts which may be held by El Paso (or its nominee) for the purchase of transport gas under the foregoing provisions of this Section 16.1, at the time of termination of this contract (regardless of the reason for such termination), in the event such assignment or re-assignment is tendered by El Paso (or its nominee) within thirty (30) days after the date of termination of this contract.

ARTICLE XVII. INTERSTATE COMMERCE.

17.1 Representatives and counsel of both El Paso and Houston consider that the sale and transportation of gas to El Paso as provided in this agreement are exclusively in intrastate commerce,

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and do not constitute a sale, resale or transportation in interstate commerce, as defined in the Natural Gas Act (June 21, 1938, c. 556, Sec. 24, 52 Stat. 833, Ch. 15.13, Title 15, U.S.C.A., Sec. 717-717W), as amended (herein called the Natural Gas Act"), as construed by the courts (federal and state) having jurisdiction of the subject matter thereof. However, in the event that the sale or the transportation of any gas hereunder shall ever prove to be or shall ever become a sale or a transportation, or both, of gas in interstate commerce under the terms of the Natural Gas Act, as heretofore or hereafter amended, or in substitute legislation covering the same or similar subject matter, then Houston shall have the right, at its option, to immediately cancel and terminate this contract, by written notice thereof to El Paso.

17.2 In the event that a bill is passed by both Houses of Congress which would, in the opinion of Houston's general attorneys, extend the application of the Natural Gas Act (or any substitute or supplemental federal legis-

lation covering the same or similar subject matter) and the jurisdiction of the Federal Power Commission (or any successor federal agency, commission or board performing the same or similar functions with respect to the gas industry) so as to cover and include the sale or transportation of gas hereunder by Houston and so as to render Houston, or the sale to Houston by independent producers selling gas to Houston, subject to such federal legislation and to the jurisdiction of such federal agency, commission or board by reason of the sale or transportation of gas hereunder by Houston, then in each such event (subject to the provision set out

hereinafter), Houston shall have the right to terminate this agreement by giving written notice of cancellation to El Paso and this agreement shall terminate upon receipt of such notice by El Paso; *provided* that, although this agreement will have fully terminated upon receipt of such notice by El Paso, this agreement may be reinstated at the election of either El Paso or Houston and shall thereafter be and continue in full force and effect in the event the President shall veto such bill, upon the giving of written notice of reinstatement by either party to the other at any time within ten (10) days after such Presidential veto, and the period of time between such termination by Houston and the date of such reinstatement shall thereafter be considered and treated for all purposes hereunder in the same manner as a period of inability of Houston to make deliveries as provided in Article XIV hereof; *provided, further*, that in the event such Presidential veto shall thereafter be overridden by the vote of either House of Congress, this agreement shall immediately and automatically terminate without the necessity of any action on the part of either Houston or El Paso, as of the time of such vote by the *first* House of Congress to so override such

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Presidential veto; and *provided, further,* however, that although this agreement will have fully terminated upon such vote by said first House of Congress, nevertheless in the event the *second* House of Congress to act thereon shall not override such Presidential veto by sufficient majority vote, then in such event this agreement may again be reinstated at the election of either El Paso or Houston and shall thereafter be and continue in full

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force and effect upon the giving of written notice of reinstatement by either party to the other at any time within ten (10) days after such second House of Congress has completed action on such bill and has failed to override such Presidential veto and such bill has been finally removed from the calendar of such House of Congress, and in such event the period of time between termination of this agreement upon action by said first House of Congress as aforesaid and reinstatement of this agreement upon notice of reinstatement as aforesaid shall thereafter be considered and treated for all purposes hereunder in the same manner as a period of inability of Houston to make deliveries as provided in Article XIV hereof. It is, however, expressly stipulated and provided that the right of termination conferred upon Houston in this Section 17.2 shall be applicable and may be exercised *only* in the event that the new federal bill referred to in the preceding sentence is of such nature that Houston, or the sale to Houston by independent producers selling gas to Houston, would not, *but for* the existence of this agreement and the sale or transportation of gas hereunder by Houston, come within the scope of such bill. It is further expressly stipulated and provided that in the event this agreement is terminated in connection with proceedings for enactment of new federal legislation under the foregoing provisions of this Section 17.2, then in the further event that such new

federal legislation shall after enactment thereof be finally held and determined to be unconstitutional and invalid (as to all the provisions of the original legislative bill which constituted grounds for termination of this agreement under the foregoing

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provisions of this Section 17.2) by final judgment of a court of competent jurisdiction not subject to further appeal, rehearing or review, then even though this agreement will have fully terminated on the date and in the manner hereinabove provided in this Section 17.2, this agreement may nevertheless be reinstated at the election of either El Paso or Houston and shall thereafter be and continue in full force and effect, upon the giving of written notice of reinstatement by either party to the other at any time within ten (10) days after such judgment becomes final as aforesaid; and, in such event, the period of time between such termination hereof and the date of such reinstatement shall thereafter be considered and treated for all purposes hereunder in the same manner as a period of inability of Houston to make deliveries as provided in Article XIV hereof.

17.3 If Houston's right to cancel and terminate this contract under any provision hereof is denied, suspended, canceled or rendered unenforceable by order of any court or governmental regulatory authority, federal or state, and no appeal shall have been taken from such order within the time within which such appeal may be taken or proceedings brought, or, such appeal having been taken or proceedings brought, they shall not have resulted in the final dismissal or stay of such order, then at any time thereafter Houston shall have the right to exercise either of the following options:

(a) Houston may isolate any portion or portions of Houston's then existing pipe line system from

the remaining portion thereof, and thereafter furnish the entire requirements of gas hereunder from gas reserves covered by gas purchase contracts of Houston or otherwise owned or controlled by Houston which are connected with and supplying gas to such isolated portion of said pipe line system and sufficient to satisfy the requirements of this contract for the then remaining term hereof. At Houston's election, this contract, together with such isolated portion of Houston's pipe line system and such designated purchase contracts covering said gas reserves may be assigned to any affiliated company of Houston or to any corporation to be formed by Houston.

(b) To designate specific gas purchase contracts or gas reserves otherwise owned or controlled by Houston sufficient to furnish the entire requirements of this contract for the remaining term hereof and dedicate all of same to the performance of this contract, thereby releasing from the provisions hereof all other facilities, contracts and reserves of Houston.

ARTICLE XVIII. WARRANTIES OF TITLE.

18.1 Houston warrants title to all gas delivered hereunder to El Paso at the point of delivery and agrees to indemnify El Paso from all suits, actions, debts, accounts, damages, costs, losses

and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon. In like manner, El Paso warrants title to all gas delivered to Houston as transport gas and agrees to

indemnify Houston from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon.

ARTICLE XIX. NOTICES.

19.1 Notice to be given hereunder shall be deemed sufficiently served if and when deposited in the United States Certified Mail, with postage prepaid, addressed to Houston at its office in Houston, Texas, and to El Paso at its office in El Paso, Texas.

ARTICLE XX. SUCCESSORS AND ASSIGNS.

20.1 This agreement shall bind and benefit the parties hereto and their respective successors and assigns except that no conveyance or transfer of any interest of either party shall be binding upon the other party until such other party has been furnished with written notice and true copy of such convenyance or transfer; provided that either El Paso or Houston, or both, may assign its right, title and interest in, to and by virtue of this agreement, including any and all extensions, renewals, amendments and supplements thereto, to a trustee or trustees, individual or corporate, as security for bonds or other obligations or securities, without such trustee or trustees assuming

or becoming in any respect obligated to perform any of the obligations of the assignor, and, if any such trustee be a corporation, without its being required by the parties hereto to qualify to do business in the State of Texas. It is further expressly stipulated and provided that no assignment by either Houston or El Paso to any other person or party of any of their rights or interests under this contract shall have the effect of relieving said Houston

or El Paso, as the case may be, from full liability and financial responsibility for performance (both before and after any such assignment) of all the obligations and duties herein provided and imposed upon Houston and El Paso, respectively, nor shall any such assignment by El Paso have the effect of waiving or releasing or in any manner altering or changing whatsoever the express restrictions and covenants as to the use to be made of gas sold and delivered hereunder as provided and set out in Sections 2.1 and 2.2 of this contract.

ARTICLE XXI. MISCELLANEOUS.

21.1 This contract constitutes the entire agreement between the parties, and no other representations, memoranda, agreements or other matter, oral or written, prior to the time hereof, shall vary, alter or interpret the terms hereof. The side head captions and the index in this instrument are for convenience of the parties in identification of the provisions hereof and shall not constitute a part of the agreement nor be considered interpretative thereof. In the consideration and interpretation of this agreement, the following shall apply:

(a) This agreement was prepared jointly by the parties hereunder and not by either party to the exclusion of the other.

(b) Failure to exercise any right hereunder shall not be considered a waiver of such right or rights in the future.

(c) Time is of the essence with regard to all obligations to be performed on or by a specified date, if any, herein contained.

In Witness Whereof, the parties hereto have caused this instrument to be executed in duplicate originals of equal dignity as of the day and year first above written.

Attest:

E. McCarthy
Assistant Secretary

Houston Pipe Line Company

By Robert L. Dabney
Vice President

Attest:

.....
Assistant Secretary

El Paso Natural Gas Company

By D. H. Tucker
D. H. Tucker
Vice President

(Seal)

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The State of Texas }
County of Harris }

Before Me, the undersigned authority, on this day personally appeared Robert L. Dabney, President of Houston Pipe Line Company, a Texas corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, as the act and deed of said corporation and in the capacity therein stated.

Given under my hand and seal of office this the 19th day of July, 1960.

Bessie Barineau
Notary Public in and for
Harris County, Texas.

(Seal)

THE STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared D. H. Tucker, Vice President of EL PASO NATURAL GAS COMPANY, a Delaware corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to be that he executed the same for the purposes and consideration therein expressed, as the act and deed of said corporation and in the capacity therein stated.

GIVEN under my hand and seal of office this the 19th day of July, 1960.

AUDREY JANE PUMPHREY
Notary Public in and for
Harris County, Texas.

(Seal)

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Exhibit No. 4

ARGO OIL CORPORATION—HOUSTON PIPE LINE COMPANY

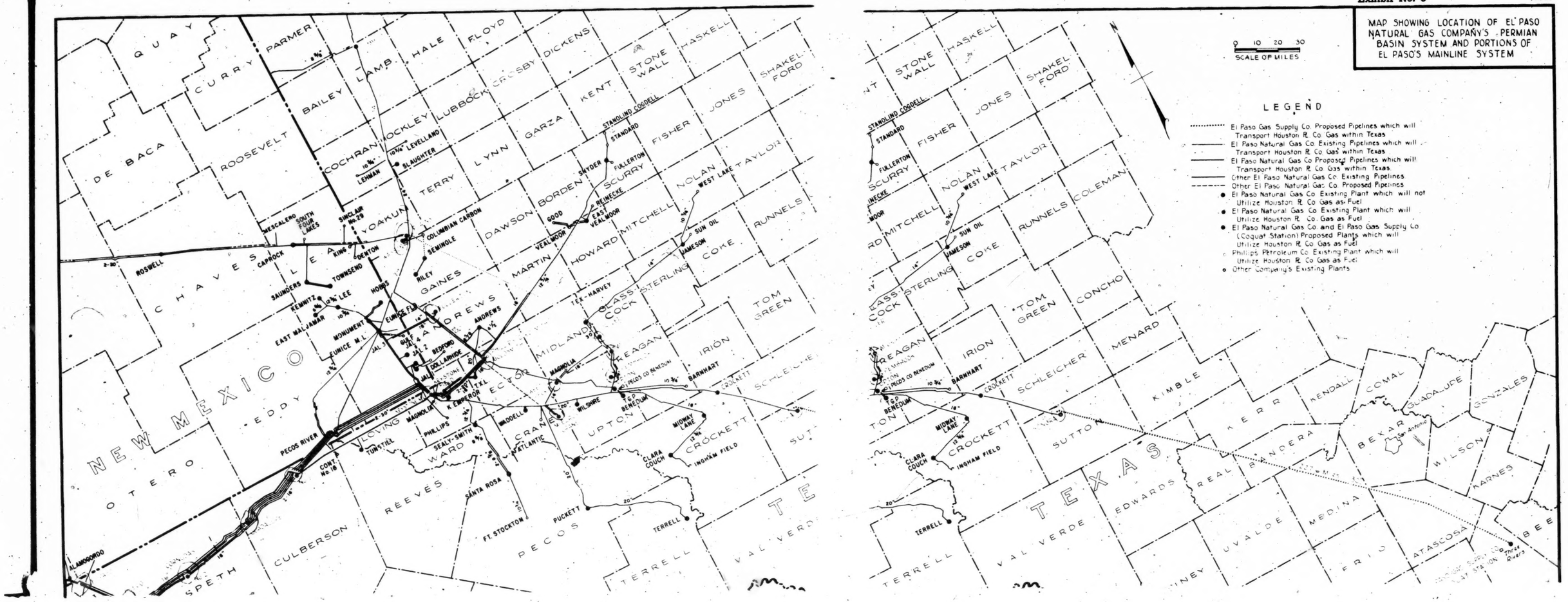
GAS PURCHASE CONTRACT

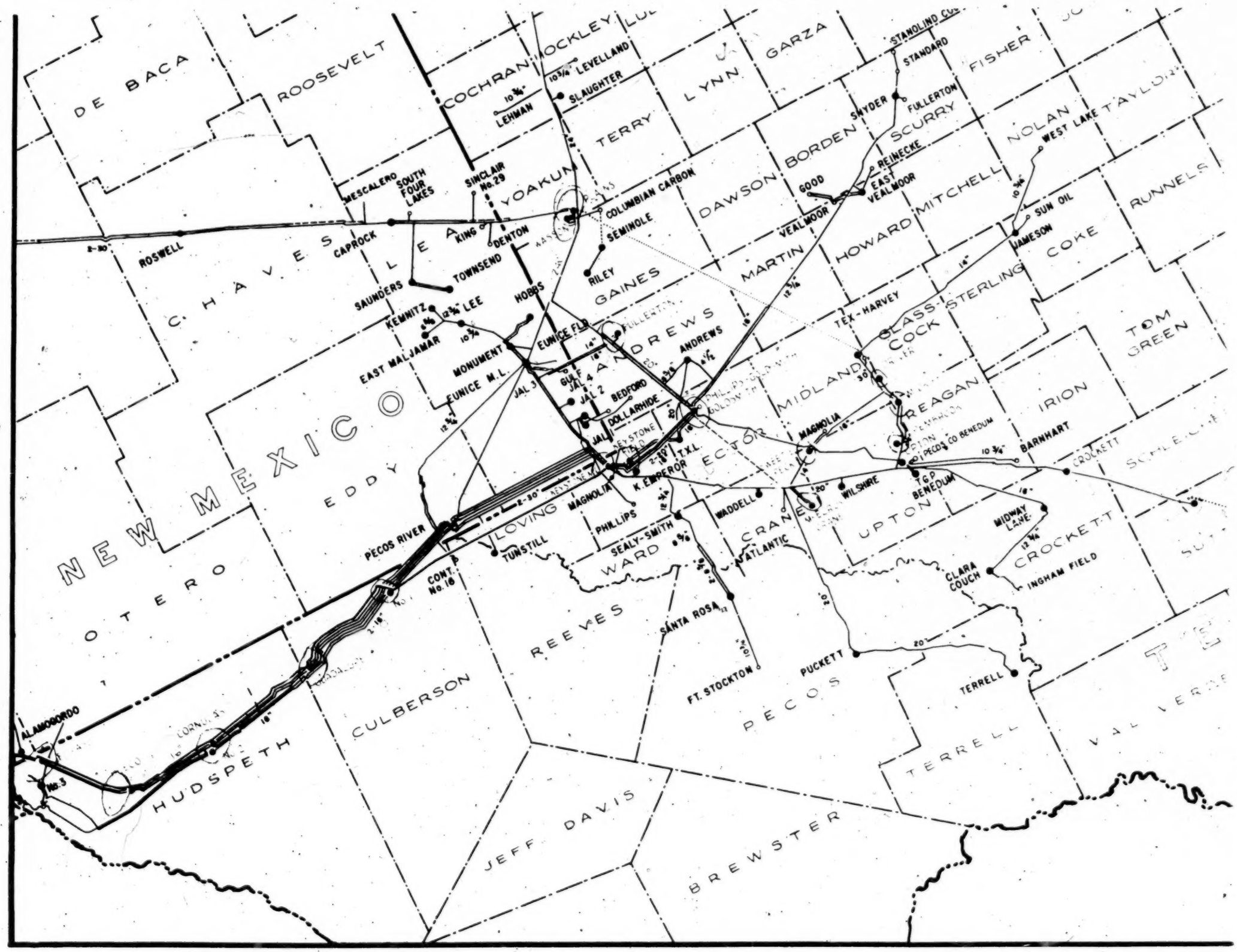
Dated November 15, 1958
Page 41

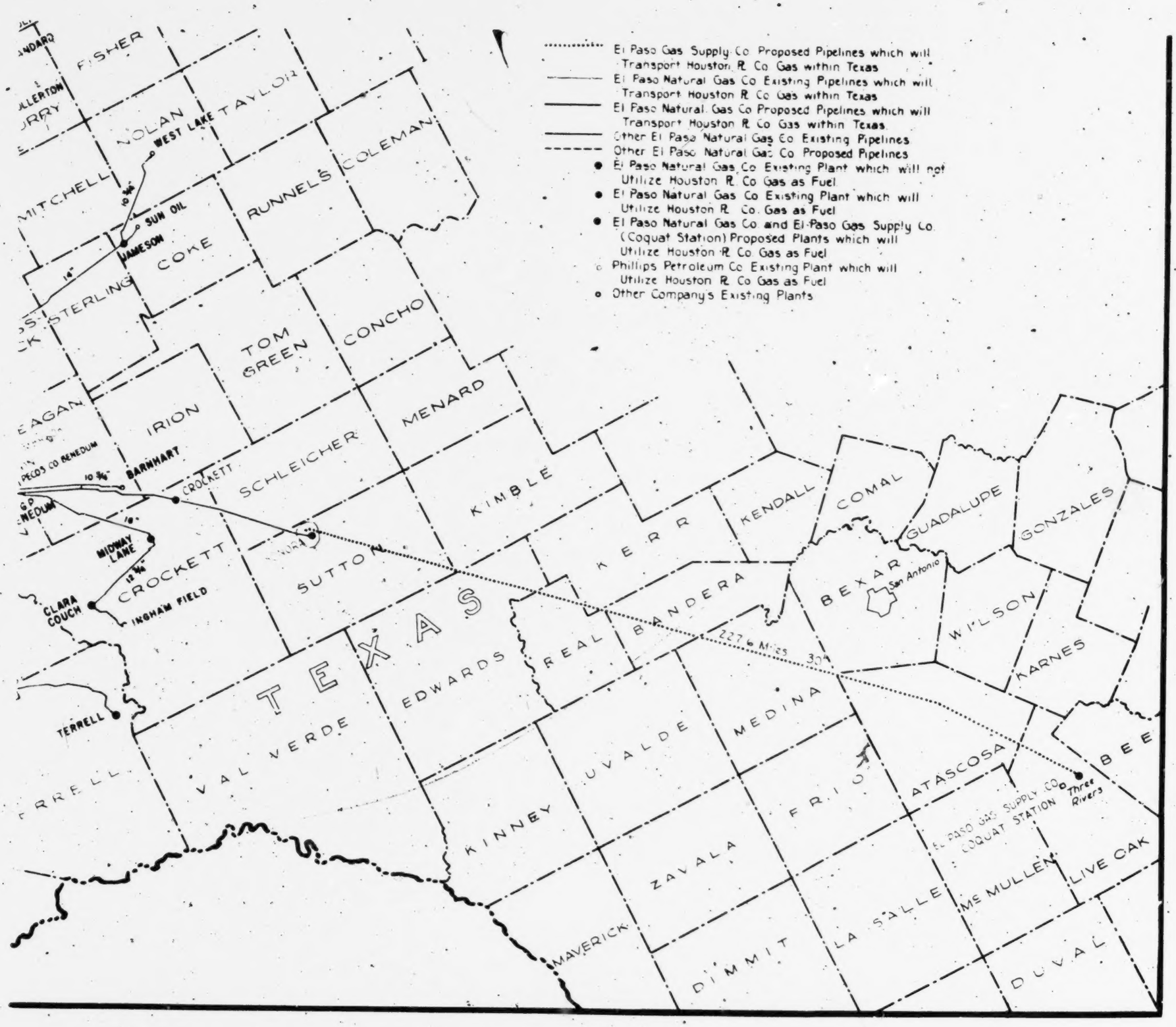
XVII. SALES BY BUYER IN INTERSTATE COMMERCE.

17.1 Buyer represents that Buyer has no present desire or intention that the gas delivered to Buyer by Seller hereunder be transported in interstate commerce or sold for resale in interstate commerce. If because of changed conditions which Buyer cannot now foresee, Buyer should desire to transport or sell gas delivered hereunder into interstate commerce, Buyer shall give Seller not less than sixty

(60) days' prior written notice of its intention to sell or deliver any gas purchased hereunder for transportation, sale or resale in interstate commerce, as such term is defined in the Natural Gas Act (June 21, 1938, c. 556, Sec. 24, 52 Stat. 833, Ch. 1513, Title 15, U.S.C.A.), as heretofore or hereafter amended, or in substitute legislation covering the same or similar subject matter, and notwithstanding any other provision hereof, Seller shall have and is hereby given the continuing right and option to cancel and terminate this contract at any time during the period of fifty-five (55) days next following the receipt by Seller of any such notice from Buyer by the giving of written notice of such cancellation and termination to Buyer within such period of time, but not thereafter. The failure of Seller to cancel and terminate this contract according to the provisions of this Article XVII within such period after receipt of any such notice from Buyer shall be conclusively presumed to be an election by Seller not to cancel and terminate this contract and Seller shall thereafter be obligated to cooperate with Buyer in making the certificate applications, rate filings, and other filings in accordance with the said Natural Gas Act, as heretofore or hereafter amended, or as required in substitute legislation covering the same or similar subject matter.


MAP SHOWING LOCATION OF EL PASO NATURAL GAS COMPANY'S PERMIAN BASIN SYSTEM AND PORTIONS OF EL PASO'S MAINLINE SYSTEM
0 10 20 30
SCALE OF MILES
LEGEND
El Paso Gas Supply Co. Proposed Pipelines which will Transport Houston R. Co. Gas within Texas
El Paso Natural Gas Co. Existing Pipelines which will Transport Houston R. Co. Gas within Texas
El Paso Natural Gas Co. Proposed Pipelines which will Transport Houston R. Co. Gas within Texas
Other El Paso Natural Gas Co. Existing Pipelines
Other El Paso Natural Gas Co. Proposed Pipelines
El Paso Natural Gas Co. Existing Plant which will not Utilize Houston R. Co. Gas as Fuel
El Paso Natural Gas Co. Existing Plant which will Utilize Houston R. Co. Gas as Fuel
El Paso Natural Gas Co. and El Paso Gas Supply Co. (Coquat Station) Proposed Plants which will Utilize Houston R. Co. Gas as Fuel
Phillips Petroleum Co. Existing Plant which will Utilize Houston R. Co. Gas as Fuel
Other Company's Existing Plants
NEW MEXICO
TEXAS
QUAY
CURRY
ROOSEVELT
DE BACA
PARMER
BAILEY
LAMB
HALE
FLOYD
CASTRO
SWISHER
CROSBY
DICKENS
KING
KNOX
HASKELL
STONEWALL
JONES
SHACKELFORD
STEPHENS
YOUNG
THROCKMORTON
CHAVES
ROSWELL
CAPROCK
LEA
HOBBS
TOWNSEND
DENTON
SAUNDERS
KEMNITZ
EAST MALJAMAR
MONUMENT
EUNICE M.L.
EUNICE FLD.
OIL CENTER
BEDFORD
JAL
JAL 3
JAL 2
ANDREWS
ECTOR
MIDLAND
MARTIN
HOWARD
GLASSCOCK
STERLING
COKE
RUNNELS
COLEMAN
TOM GREEN
CONCHO
IRION
REAGAN
UPTON
CRANE
WARD
REEVES
PECOS
CULBERSON
HUDSPETH
TERRELL
VAL VERDE
CROCKETT
SUTTON
SCHLEICHER
MENARD
KIMBLE
EDWARDS
REAL
KERR
KENDALL
COMAL
BEXAR
San Antonio
GUADALUPE
GONZALES
WILSON
KARNES
BEE
ATASCOSA
FRIO
UVALDE
MEDINA
KINNEY
MAVERICK
LOVING
WINKLER
ECTOR
ANDREWS
GAINES
YOAKUM
TERRY
LYNN
GARZA
DAWSON
BORDEN
SCURRY
FISHER
NOLAN
TAYLOR
RUNNELS
COLEMAN
STANOLIND COODELL
STANDARD
FULLERTON
REINECKE
SNYDER
EAST VEALMOOR
VEALMOOR
GOOD
WEST LAKE
SUN OIL
JAMESON
TEX-HARVEY
MAGNOLIA
PECOS CO. BENEDUM
BENEDUM
BARNHART
MIDWAY LANE
CLARA COUCH
INGHAM FIELD
WILSHIRE
MIDDELL
ATLANTIC
K. EMPEROR
PHILLIPS
SEALY-SMITH
TUNSTILL
PECOS RIVER
COMT No. 16
SANTA ROSA
FT. STOCKTON
PUCKETT
TERRELL
SLAUGHTER
LEVELLAND
LEHMAN
SEMINOLE
COLUMBIAN CARBON
RILEY
SINCLAIR No. 29
SOUTH FOUR LAKES
LEE
ALAMOGORDO
10 3/4"
12 3/4"
14"
16"
18"
20"
24"
30"


DE BACA
ROOSEVELT
COCHRAN
HOCKLEY
LUBBOCK
LYNN
GARZA
STANOLIND CO.
STANDARD
FISHER
JONES
LEVELLAND
SLAUGHTER
LEHMAN
TERRY
YOAKUM
DAWSON
BORDEN
SNYDER
FULLERTON
SCURRY
NOLAN
TAYLOR
WEST LAKE
GOOD
REINECKE
EAST VEALMOOR
VEALMOOR
MARTIN
HOWARD
MITCHELL
SUN OIL
JAMESON
COKE
RUNNELS
COLUMBIAN CARBON
SEMINOLE
RILEY
CHAVES
ROSWELL
CAPROCK
MESCALERO
SOUTH FOUR LAKES
SINCLAIR No. 29
KING
DENTON
SAUNDERS
TOWNSEND
KEMNITZ
LEE
EAST MALJAMAR
MONUMENT
EUNICE M.L.
HOBBS
EUNICE FLD.
GAINES
ANDREWS
FULLERTON
TEX-HARVEY
GLASSCOCK
STERLING
TOM GREEN
MIDLAND
REAGAN
IRION
GULF
JAL 4
JAL 2
JAL 3
BEDFORD
DOLLARHIDE
JAL
KEYSTONE FIELD
T.X.L.
K. EMPEROR
MAGNOLIA
PHILLIPS
SEALY-SMITH
WARD
WADDELL
CRANE
ATLANTIC
UPTON
WILSHIRE
TGP BENEDUM
CO BENEDUM
BARNHART
MIDWAY LANE
CROCKETT
CLARA COUCH
INGHAM FIELD
SCHLEICHER
SUTTON
NEW MEXICO
EDDY
LOVING
TUNSTILL
PECOS RIVER
CONT. No. 16
OTERO
REEVES
SANTA ROSA
FT. STOCKTON
PUCKETT
PECOS
TERRELL
VAL VERDE
ALAMOGORDO
No. 3
HUDSPETH
CULBERSON
JEFF DAVIS
BREWSTER


El Paso Gas Supply Co Proposed Pipelines which will Transport Houston Pl Co Gas within Texas
El Paso Natural Gas Co Existing Pipelines which will Transport Houston Pl Co Gas within Texas
El Paso Natural Gas Co Proposed Pipelines which will Transport Houston Pl Co Gas within Texas
Other El Paso Natural Gas Co Existing Pipelines
Other El Paso Natural Gas Co Proposed Pipelines
El Paso Natural Gas Co Existing Plant which will not Utilize Houston Pl Co Gas as Fuel
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El Paso Natural Gas Co and El Paso Gas Supply Co (Coquat Station) Proposed Plants which will Utilize Houston Pl Co Gas as Fuel
Phillips Petroleum Co Existing Plant which will Utilize Houston Pl Co Gas as Fuel
Other Company's Existing Plants
FISHER
NOLAN
TAYLOR
MITCHELL
WEST LAKE
SUN OIL
JAMESON
RUNNELS
COLEMAN
COKE
STERLING
TOM GREEN
CONCHO
IRION
EAGAN
MENARD
SCHLEICHER
BARNHART
CROCKETT
KIMBLE
SUTTON
KERR
KENDALL
COMAL
GUADALUPE
GONZALES
BEXAR
San Antonio
WILSON
KARNES
BANDERA
MIDWAY LANE
CLARA COUCH
INGHAM FIELD
TEXAS
EDWARDS
REAL
227.6 Miles
304
TERRELL
VAL VERDE
UVALDE
MEDINA
ATASCOSA
BEE
KINNEY
ZAVALA
FRIO
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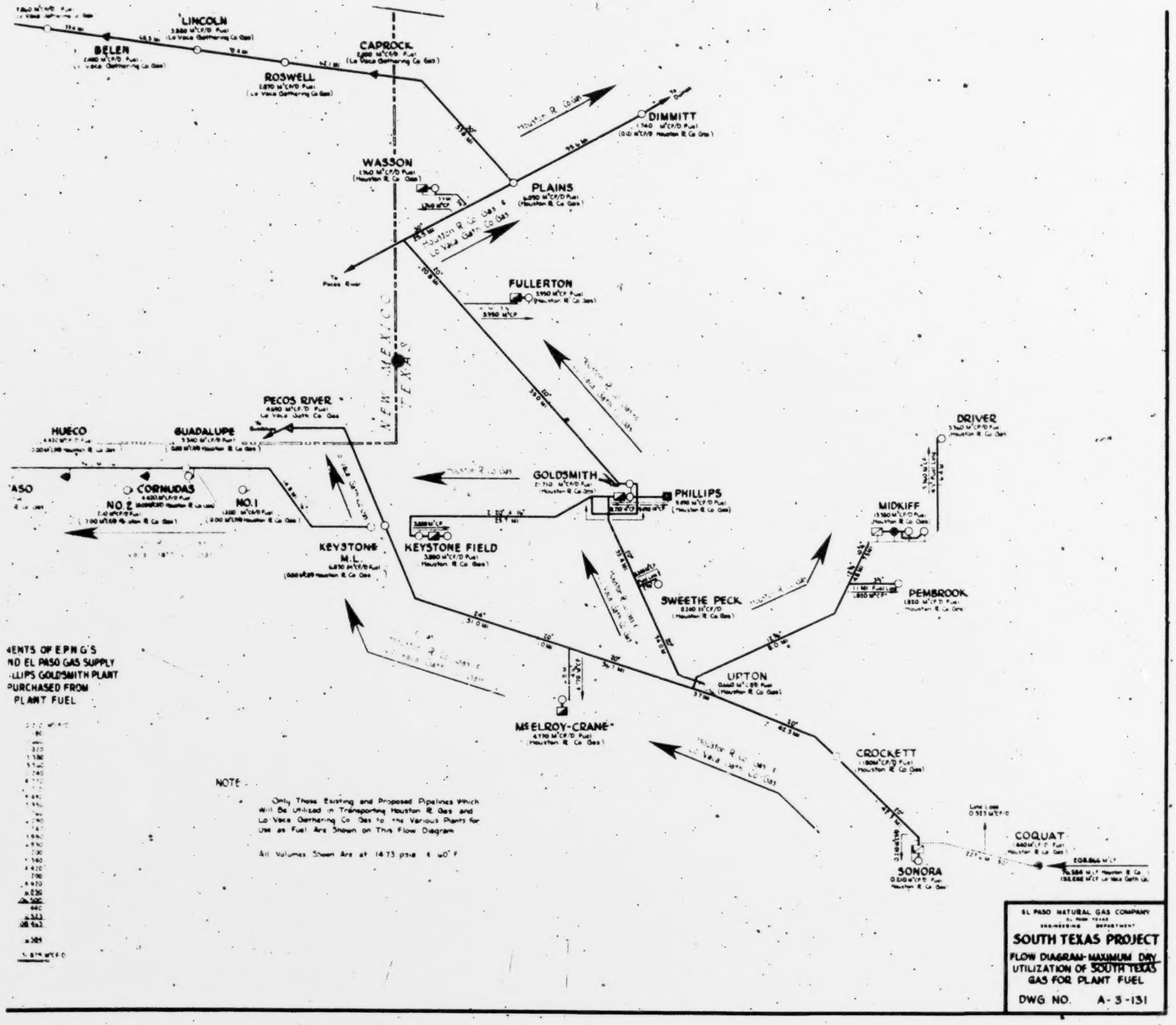
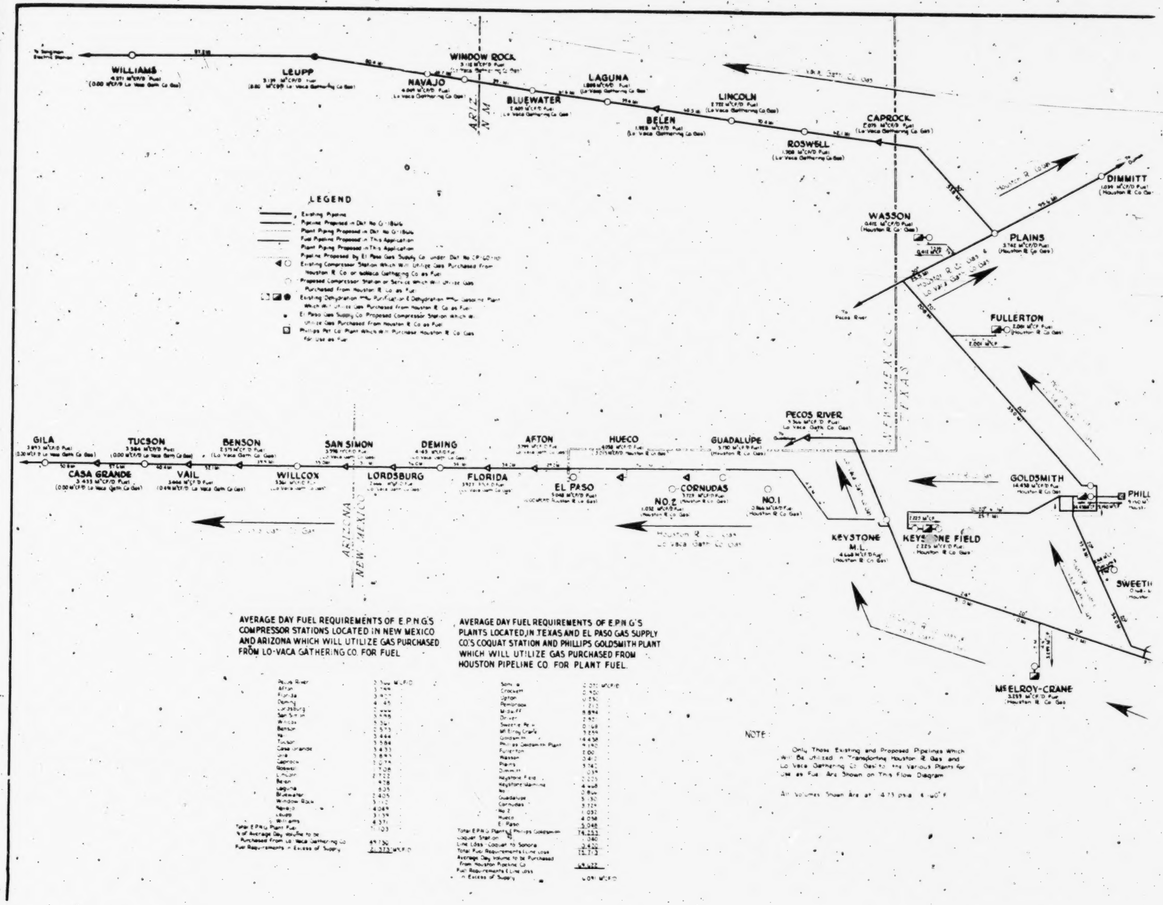
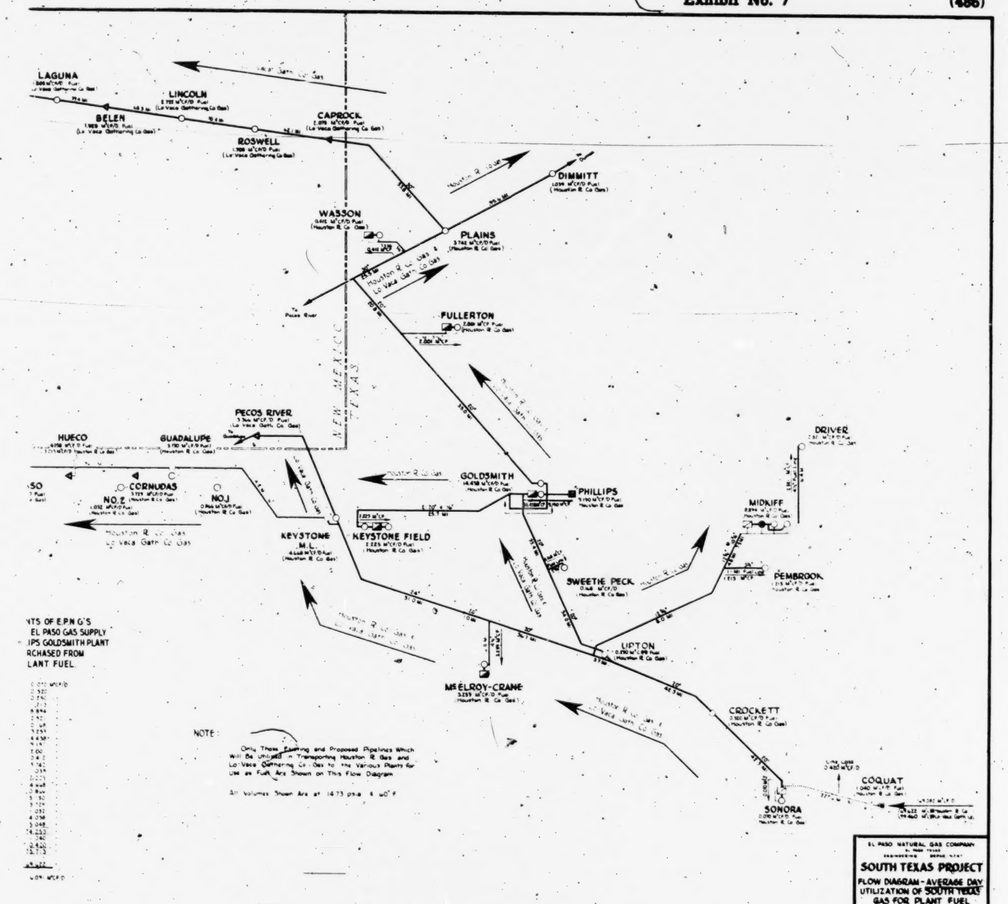
Three Rivers
MAVERICK
DIMMIT
LA SALLE
MCMULLEN
LIVE OAK
DUVAL


LINCOLN
BELEN
ROSWELL
CAPROCK
DIMMITT
WASSON
PLAINS
FULLERTON
PECOS RIVER
HUECO
GUADALUPE
CORNUDAS
NO. 2
NO. 1
GOLDSMITH
PHILLIPS
KEYSTONE M.L.
KEYSTONE FIELD
DRIVER
MIDKIFF
PEMBROOK
SWEETIE PECK
UPTON
McELROY-CRANE
CROCKETT
COQUAT
SONORA
NEW MEXICO
TEXAS
Houston R. Co. Gas
Pecos River
NOTE
Only Those Existing and Proposed Pipelines Which Will Be Utilized in Transporting Houston R. Gas and Lo Vaca Gathering Co. Gas to the Various Plants for Use as Fuel Are Shown on This Flow Diagram
All Volumes Shown Are at 14.73 psia &
EL PASO NATURAL GAS COMPANY
SOUTH TEXAS PROJECT
FLOW DIAGRAM-MAXIMUM DAY
UTILIZATION OF SOUTH TEXAS GAS FOR PLANT FUEL
DWG NO. A-3-131



AVERAGE DAY FUEL REQUIREMENTS OF E.P.N.G.'S COMPRESSOR STATIONS LOCATED IN NEW MEXICO AND ARIZONA WHICH WILL UTILIZE GAS PURCHASED FROM LO-VACA GATHERING CO. FOR FUEL

AVERAGE DAY FUEL REQUIREMENTS OF E.P.N.G.'S PLANTS LOCATED IN TEXAS AND EL PASO GAS SUPPLY CO.'S COQUAT STATION AND PHILLIPS GOLDSMITH PLANT WHICH WILL UTILIZE GAS PURCHASED FROM HOUSTON PIPELINE CO. FOR PLANT FUEL

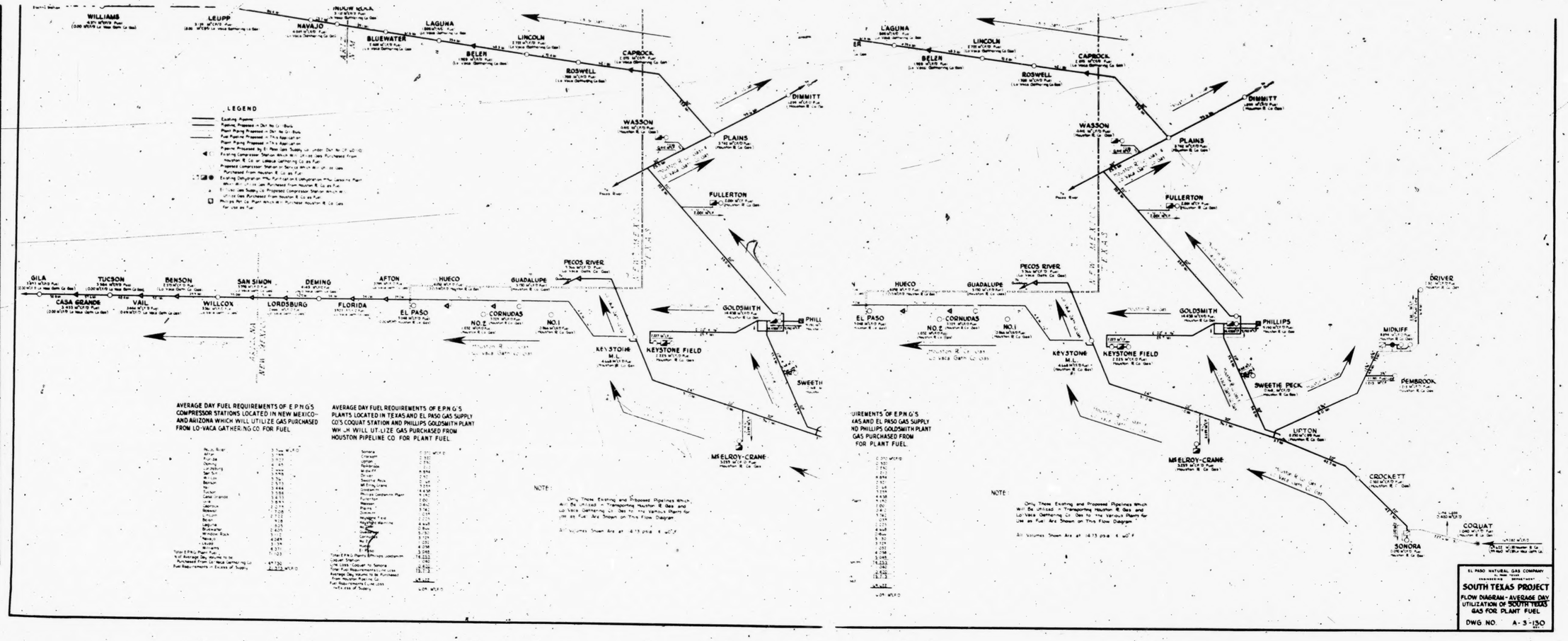


EL PASO NATURAL GAS COMPANY

SOUTH TEXAS PROJECT

FLOW DIAGRAM - AVERAGE DAY UTILIZATION OF SOUTH TEXAS GAS FOR PLANT FUEL

DWG NO. A-3-190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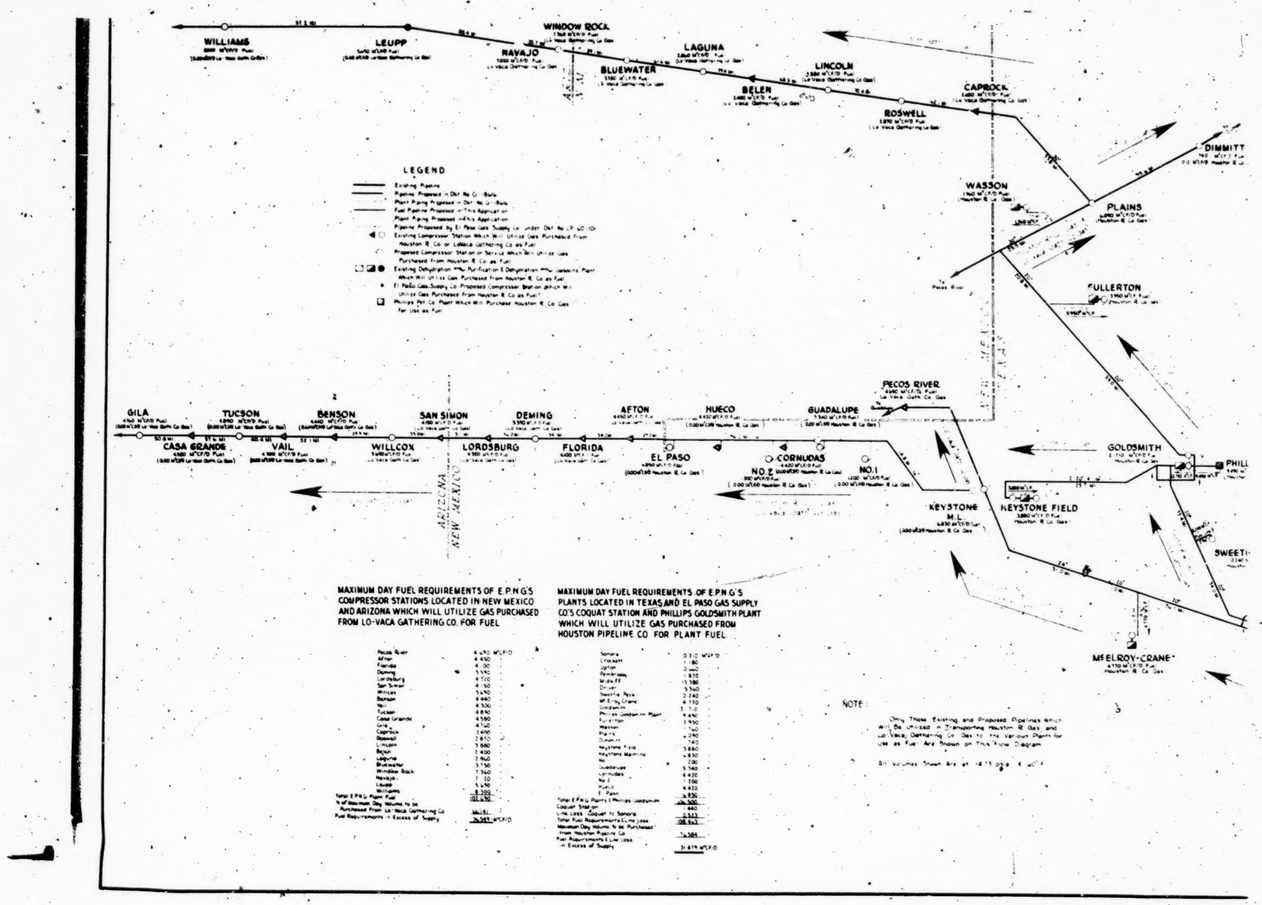
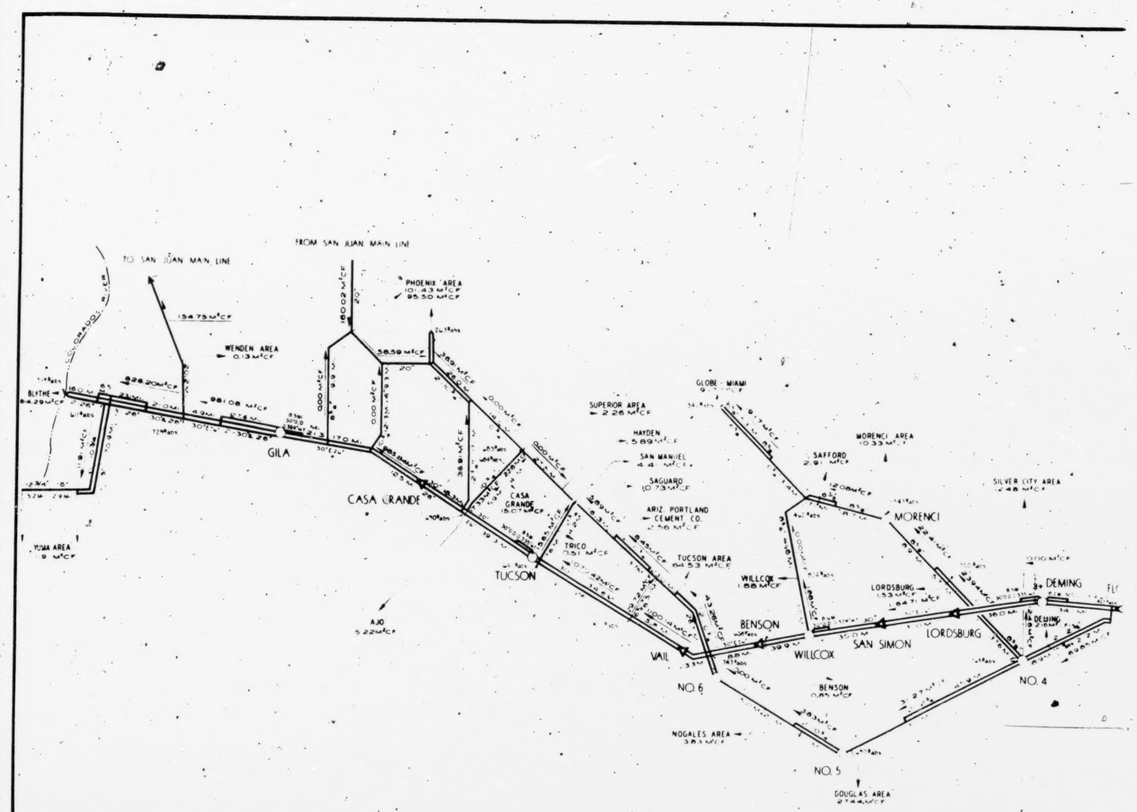
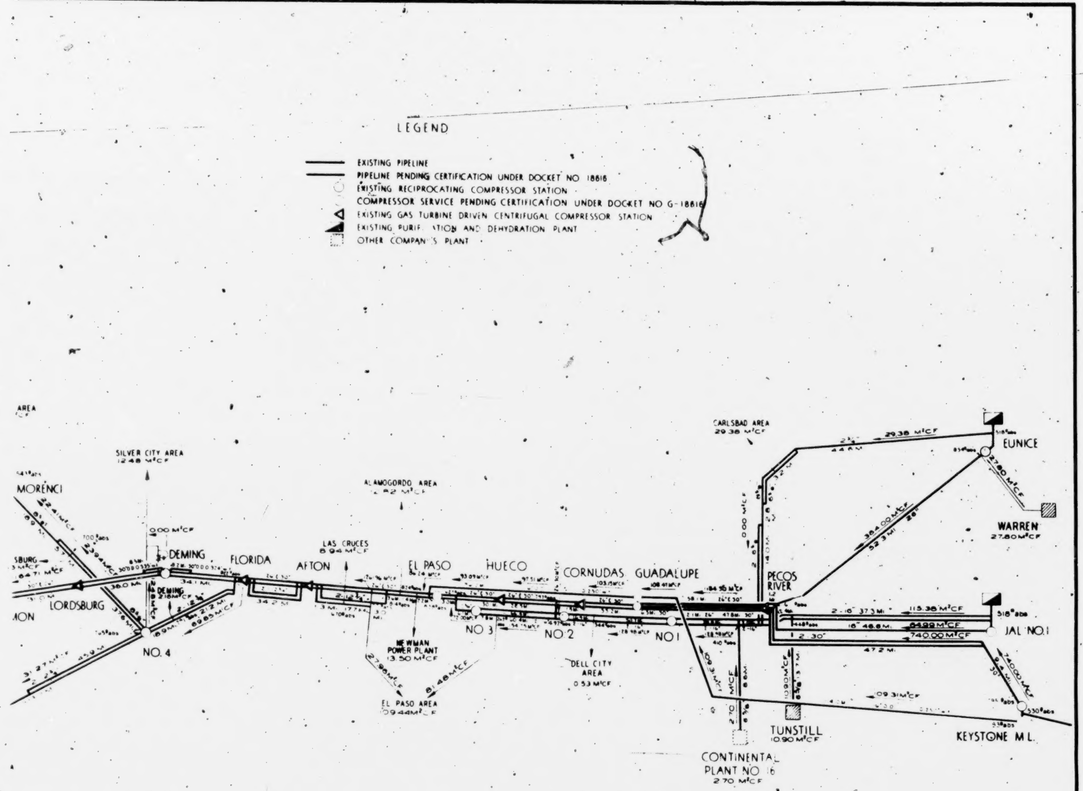
NAVAJO
BLUEWATER
LAGUNA
BELEN
LINCOLN
ROSWELL
CAPROCK
DIMMITT
WASSON
PLAINS
FULLERTON
GILA
TUCSON
BENSON
SAN SIMON
DEMING
AFTON
HUECO
GUADALUPE
PECOS RIVER
CASA GRANDE
VAIL
WILLCOX
LORDSBURG
FLORIDA
EL PASO
CORNUDAS
NO. 2
NO. 1
GOLDSMITH
KEYSTONE
KEYSTONE FIELD
PHILLIPS
SWEETIE PECK
DRIVER
MIDKIFF
PEMBROOK
UPTON
CROCKETT
COQUAT
SONORA
McELROY-CRANE
LEGEND
AVERAGE DAY FUEL REQUIREMENTS OF E P N G'S COMPRESSOR STATIONS LOCATED IN NEW MEXICO AND ARIZONA WHICH WILL UTILIZE GAS PURCHASED FROM LO-VACA GATHERING CO. FOR FUEL
AVERAGE DAY FUEL REQUIREMENTS OF E P N G'S PLANTS LOCATED IN TEXAS AND EL PASO GAS SUPPLY CO'S COQUAT STATION AND PHILLIPS GOLDSMITH PLANT WHICH WILL UTILIZE GAS PURCHASED FROM HOUSTON PIPELINE CO. FOR PLANT FUEL
NOTE
Only Those Existing and Proposed Pipelines Which Will Be Utilized in Transporting Houston & Gas and Lo-Vaca Gathering Co. Gas to the Various Plants for Use as Fuel Are Shown on This Flow Diagram
All Volumes Shown Are at 14.73 psia & 60° F
EL PASO NATURAL GAS COMPANY
ENGINEERING DEPARTMENT
SOUTH TEXAS PROJECT
FLOW DIAGRAM - AVERAGE DAY UTILIZATION OF SOUTH TEXAS GAS FOR PLANT FUEL
DWG NO. A-3-130


WILLIAMS
LEUPP
WINDOW ROCK
NAVAJO
BLUEWATER
LAGUNA
BELEN
LINCOLN
CAPROCK
ROSWELL
DIMMITT
WASSON
PLAINS
FULLERTON
PECOS RIVER
GUADALUPE
HUECO
AFTON
DEMING
SAN SIMON
BENSON
TUCSON
GILA
CASA GRANDE
VAIL
WILLCOX
LORDSBURG
FLORIDA
EL PASO
CORNUDAS
NO. 2
NO. 1
KEYSTONE M.L.
KEYSTONE FIELD
GOLDSMITH
MCELROY-CRANE
ARIZONA
NEW MEXICO
LEGEND
Existing Pipeline
Pipeline Proposed - Dkt No. G-
Plant Piping Proposed - Dkt No. G-
Fuel Pipeline Proposed - This Application
Plant Piping Proposed - This Application
Pipeline Proposed by El Paso Gas Supply Co. under Dkt No. CP 60-10
Existing Compressor Station which will utilize Gas Purchased From Houston R. Co. or Lo-Vaca Gathering Co as Fuel
Proposed Compressor Station or Service which will utilize Gas Purchased From Houston R. Co. as Fuel
Existing Dehydration Plant Purification Dehydration Plant which will utilize Gas Purchased From Houston R. Co as Fuel
El Paso Gas Supply Co. Proposed Compressor Station which will utilize Gas Purchased From Houston R. Co as Fuel
Mirages Art Co. Plant which will Purchased Houston R. Co. Gas for use as Fuel
MAXIMUM DAY FUEL REQUIREMENTS OF E.P.N.G.'S COMPRESSOR STATIONS LOCATED IN NEW MEXICO AND ARIZONA WHICH WILL UTILIZE GAS PURCHASED FROM LO-VACA GATHERING CO. FOR FUEL
MAXIMUM DAY FUEL REQUIREMENTS OF E.P.N.G.'S PLANTS LOCATED IN TEXAS AND EL PASO GAS SUPPLY CO.'S COQUAT STATION AND PHILLIPS GOLDSMITH PLANT WHICH WILL UTILIZE GAS PURCHASED FROM HOUSTON PIPELINE CO. FOR PLANT FUEL
NOTE



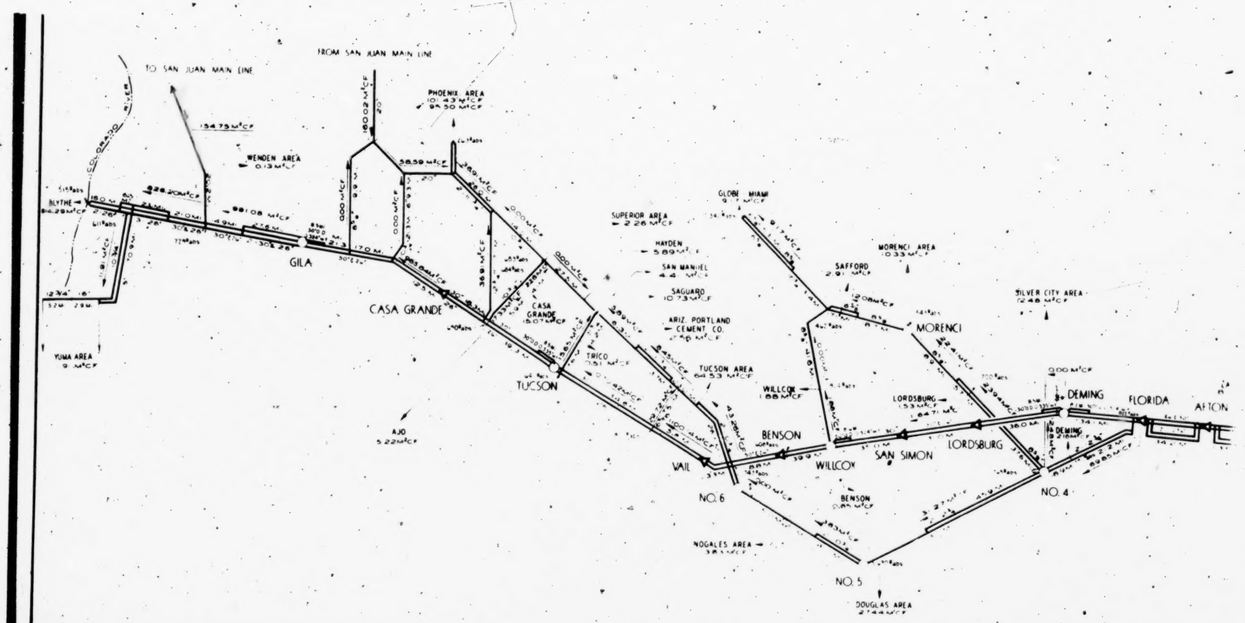
SERVICE	CALIFORNIA MAIN LINE																					EL PASO MAIN						
STATION LOCATION	GILA	CASA GRANDE	TUCSON	VAIL	BENSON	WILLCOX	SAN SIMON	LORDSBURG	DEMING	FLORIDA	AFTON	EL PASO	HUECO	CORNUDAS	GUADALUPE (28.530")	PECOS RIVER	EUNICE	JAL	KEYSTONE (30")	MORENCI	NO. 6	NO. 5	NO. 4	NO. 3	NO. 2	NO. 1
SUCTION PRESSURE psi abs	634	600	635	629	613	622	634	630	634	654	657	599	617	623	662	827	632	593	513	515							
DISCHARGE PRESSURE psi abs	849	830	839	828	805	837	816	818	8.0	827	846	843	807	811	843	1088	837	841	727	800	1188							
RATIO	1346	1383	1322	1317	1313	1346	1288	1299	1293	1264	1288	407	1308	1301	1273	1316	1325	643	417	1553	2307							
SUCTION TEMPERATURE °F	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°							
BHP/MCF AT 14.73 psi & 60° F	17.02	17.14	16.34	14.41	14.28	17.26	13.20	13.67	15.21	12.15	13.7	9.53	14.01	13.76	14.42	16.10	14.81	28.09	9.9	24.85	55.98							
MCF TO COMPRESS AT 14.73 psi & 60° F	981.08	985.84	1049.88	1100.14	1147.70	1154.81	1160.58	1164.7	1169.01	1244.4	1249.1	2100.00	1158.00	1243.10	1243.10	1011.1	1243.10	2240.20	2240.20	864.99	347.00							

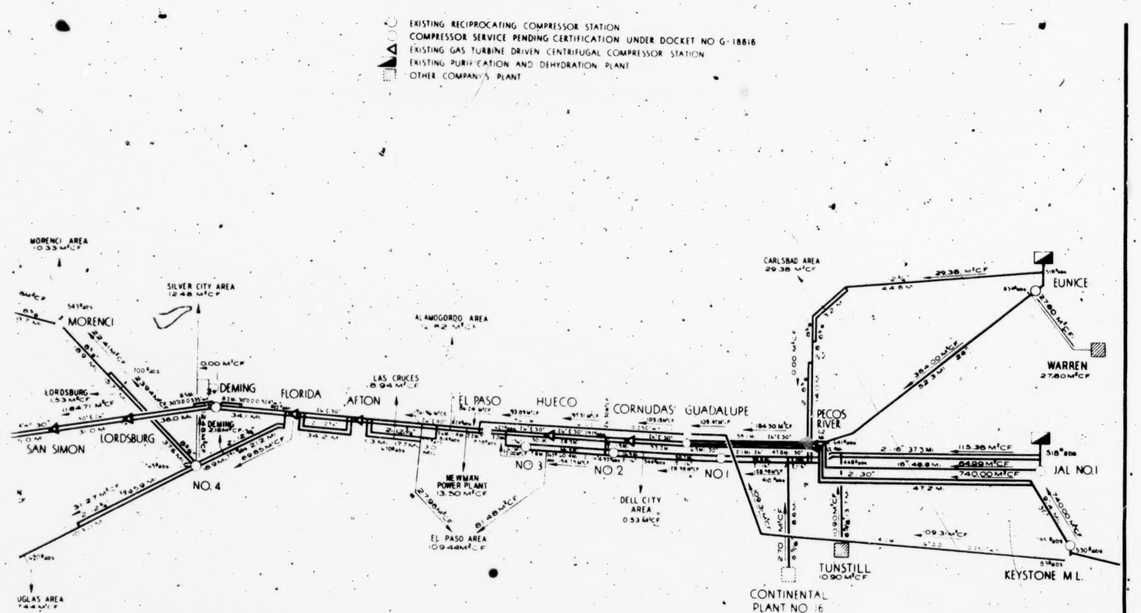


KEYSTONE (30")	EL PASO MAIN LINE						
	MORENCI	NO. 6	NO. 5	NO. 4	NO. 3	NO. 2	NO. 1
515					246	279	345
800 1188	SUPERSION BURIED		SUPERSION BURIED		866	502	487
1553 2307				SUPERSION BURIED	2711	1797	1412
70°					60°	60°	60°

ALL VOLUMES SHOWN ARE AT 14.73 psi & 60° F
AVERAGE HEATING VALUE OF GAS = 969 BTU
GRAVITY OF GAS = 0.650

SOUTHERN SYSTEM
CALIFORNIA MAIN LINE
PIPE LINE EFFICIENCY - FROM DEMING WEST = 90%

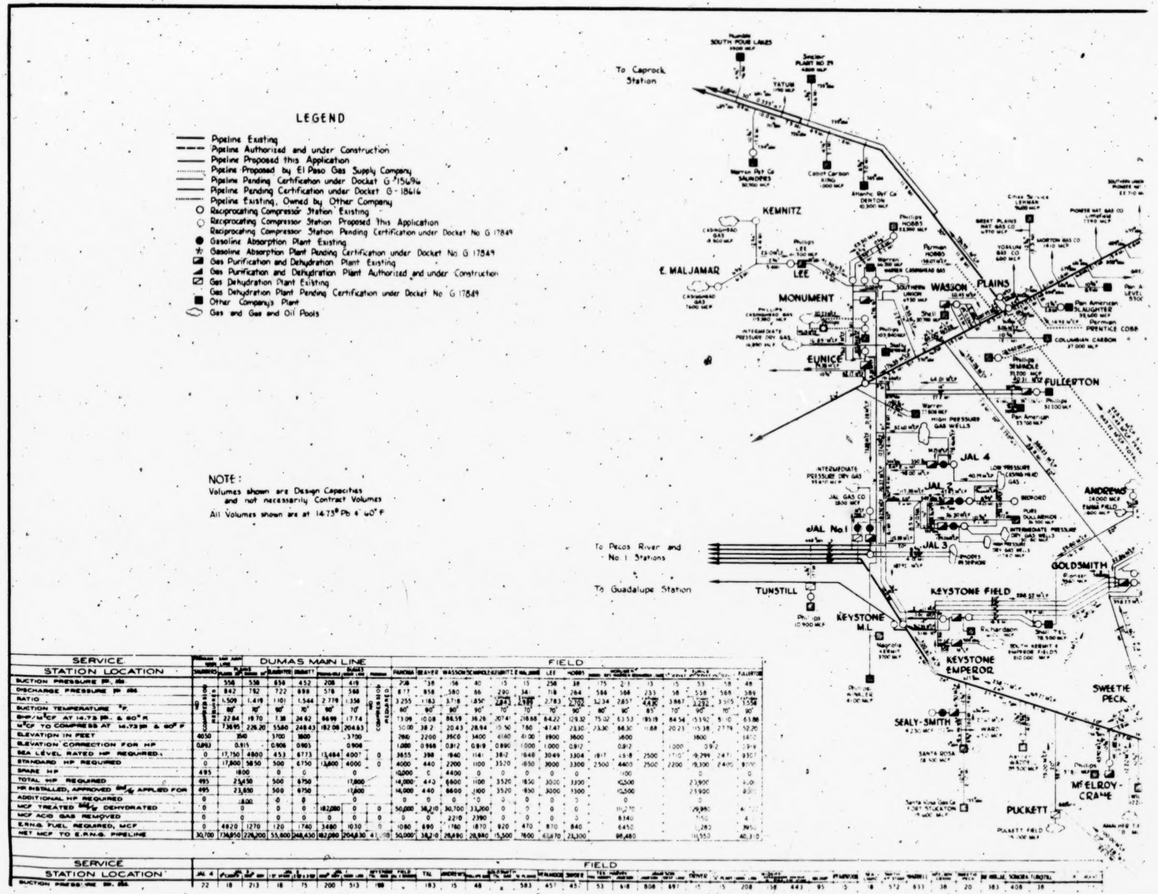




SERVICE	CALIFORNIA MAIN LINE																			EL PASO MAIN LINE							
STATION LOCATION	GILA	CASA GRANDE	TUCSON	VAIL	BENSON	WILLCOX	SAN SIMON	CRNDS.	DEMING	FLORIDA	AFTON	EL PASO	HUECO	CORNUDAS	GUADALUPE PASS	PECOS RIVER	EUNICE	JAL	KEYSTONE 30"	MORENCI	NO. 6	NO. 5	NO. 4	NO. 3	NO. 2	NO. 1	
SUCTION PRESSURE psi abs	634	600	635	629	613	622	634	630	634	654	651	599	617	623	662	827	632	513	513	515				246	279	345	
DISCHARGE PRESSURE psi abs	849	830	839	828	805	837	816	818	820	827	846	843	807	811	843	1088	837	843	727	800	1188			666	502	487	
RATIO	1340	1383	1322	1317	1313	1346	1288	1299	1293	1264	1288	407	1308	1301	1273	1316	1325	1643	1417	1553	2307			2711	1797	1412	
SUCTION TEMPERATURE °F	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°				60°	60°	60°	
BHP/M³CF AT 14.73 psi & 60°F	17.02	17.14	16.34	14.41	14.28	17.28	13.20	13.67	15.21	12.15	13.3	9.53	14.07	13.76	14.42	16.10	14.61	28.08	19.91	24.85	50.98			61.83	32.81	9.34	
M³CF TO COMPRESS AT 14.73 psi & 60°F	981.08	985.84	1049.88	1100.14	1147.70	1154.81	1160.56	1164.71	1189.03	1244.44	1249.5	230.00	1158.00	1164.30	1184.30	1013.3	1164.30	356.20	64.99	740.00	09.31			72.00	128.45	128.98	
BRAKE HP REQUIRED	16,698	16,897	17,155	15,853	16,389	19,933	15,319	15,922	17,781	15,120	16,419	24,222	16,293	16,298	17,078	16,866	17,303	10,002	12,942	18,389	55,73			44,52	42,14	24,92	
ELEVATION IN FEET	840	1285	2076	2952	3540	4460	3880	4227	4456	4098	4232	4030	4355	4380	3900		2900	3600	3000	3000				3000	3000		
ELEVATION CORRECTION FOR HP	1000	0.990	0.974	0.929	0.907	0.877	0.895	0.882	0.877	0.886	0.888	0.894	0.877	0.877	0.849		0.930	0.912	0.935	0.935				0.935	0.935		
SEA LEVEL RATED HP REQUIRED	16,698	17,067	17,612	17,064	18,049	22,728	17,118	18,052	20,275	17,065	18,636	26,870	18,556	18,560	18,967	18,46	18,605	10,967	13,83	19,867	59,80			47,66	45,08	26,65	
STANDARD HP REQUIRED	16,700	17,100	17,600	17,100	18,100	22,720	17,100	18,100	20,900	17,100	18,600	26,900	18,600	18,600	19,600	2000	18,600	11,000	14,00	20,000	60,00			49,46	47,99	27,55	
SPARE HP	1100	0	1100	0	0	1800	0	0	2200	0	0	1100	0	0	4000	0	0	1100	3000	0				4800	4800	3200	
TOTAL HP REQUIRED	17,800	17,100	18,700	17,100	18,100	24,320	17,100	18,100	23,100	17,100	18,600	28,000	18,600	18,600	25,600		18,600	12,00	4400	26,000							
HP PREVIOUSLY INSTALLED OR APPLIED FOR	17,800	17,100	18,700	17,100	18,100	24,320	17,100	18,100	23,100	17,100	18,600	28,000	18,600	18,600	25,600		18,600	12,00	4400	26,000							
ADDITIONAL HP TO INSTALL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		0	0	0	0							
MCF FUEL REQUIRED	478.0	478.0	488.0	430.0	444.0	589.0	415.0	432.0	559.0	410.0	445.0	685.0	442.0	442.0	487.0	470	469.0	285.0	37.0	524.0	159.0			127.0	120.0	84.0	
NET MCF TO PIPELINE	981,088	985,840	1,049,880	1,100,140	1,147,700	1,154,810	1,160,560	1,164,710	1,189,030	1,244,440	1,249,500	230,000	1,158,000	1,164,300	1,184,300	1,013,300	1,164,300	356,200	64,990	740,000	109,310	22,410	0	3,830	55,210	72,000	128,450	128,980

NOTE
ALL VOLUMES SHOWN ARE AT 14.73 lb. & 60°F
AVERAGE HEATING VALUE OF GAS = 1069 BTU
GRAVITY OF GAS = 0.650
SOUTHERN SYSTEM
CALIFORNIA MAIN LINE
PIPE LINE EFFICIENCY FROM DEMING TO EAST = 90%
PIPE LINE EFFICIENCY FROM DEMING EAST = 88%
FLOWING TEMPERATURE = 70°F
EL PASO MAIN LINE
PIPE LINE EFFICIENCY = 92%
FLOWING TEMPERATURE = 60°F
PROPOSED KEYSTONE TO EL PASO 16" MAINLINE
PIPE LINE EFFICIENCY 92%
FLOWING TEMPERATURE 70°F

EL PASO NATURAL GAS COMPANY
EL PASO, TEXAS
SOUTH TEXAS PROJECT
FLOW DIAGRAM SHOWING
SOUTHERN SYSTEM DESIGN CAPACITY
DWG NO. A-3-127
STUDY NO. T-3-2180-68


LEGEND
Pipeline Existing
Pipeline Authorized and under Construction
Pipeline Proposed this Application
Pipeline Proposed by El Paso Gas Supply Company
Pipeline Pending Certification under Docket G-7154/96
Pipeline Pending Certification under Docket G-18416
Pipeline Existing, Owned by Other Company
Reciprocating Compressor Station Existing
Reciprocating Compressor Station Proposed This Application
Reciprocating Compressor Station Pending Certification under Docket No G-17849
Gasoline Absorption Plant Existing
Gasoline Absorption Plant Pending Certification under Docket No G-17849
Gas Purification and Dehydration Plant Existing
Gas Purification and Dehydration Plant Authorized and under Construction
Gas Dehydration Plant Existing
Gas Dehydration Plant Pending Certification under Docket No G-17849
Other Company's Plant
Gas and Gas and Oil Pools
NOTE:
Volumes shown are Design Capacities and not necessarily Contract Volumes
All Volumes shown are at 14.73 Psi & 60° F
To Caprock Station
To Pecos River and No. 1 Stations
To Guadalupe Station
KEMNITZ
E. MALJAMAR
MONUMENT
EUNICE
LEE
WASSON
PLAINS
FULLERTON
JAL 4
JAL 3
JAL No. 1
ANDREWS
GOLDSMITH
TUNSTILL
KEYSTONE M.L.
KEYSTONE FIELD
KEYSTONE EMPEROR
SEALY-SMITH
SWEETIE PECK
McELROY-CRANE
PUCKETT
SOUTH POLE LANES
Sinclair PLANT NO. 29
TATUM
Warren Pet Co SALADO(ES)
Calvert Carbon
Amerada Pet Co DENTON
Phillips HOBBS
Pioneer
Warren
Texaco
Amerada
Pan American
Phillips SEMINOLE
Phillips
Warren
Pan American
Phillips
Richardson
Phillips
Warren
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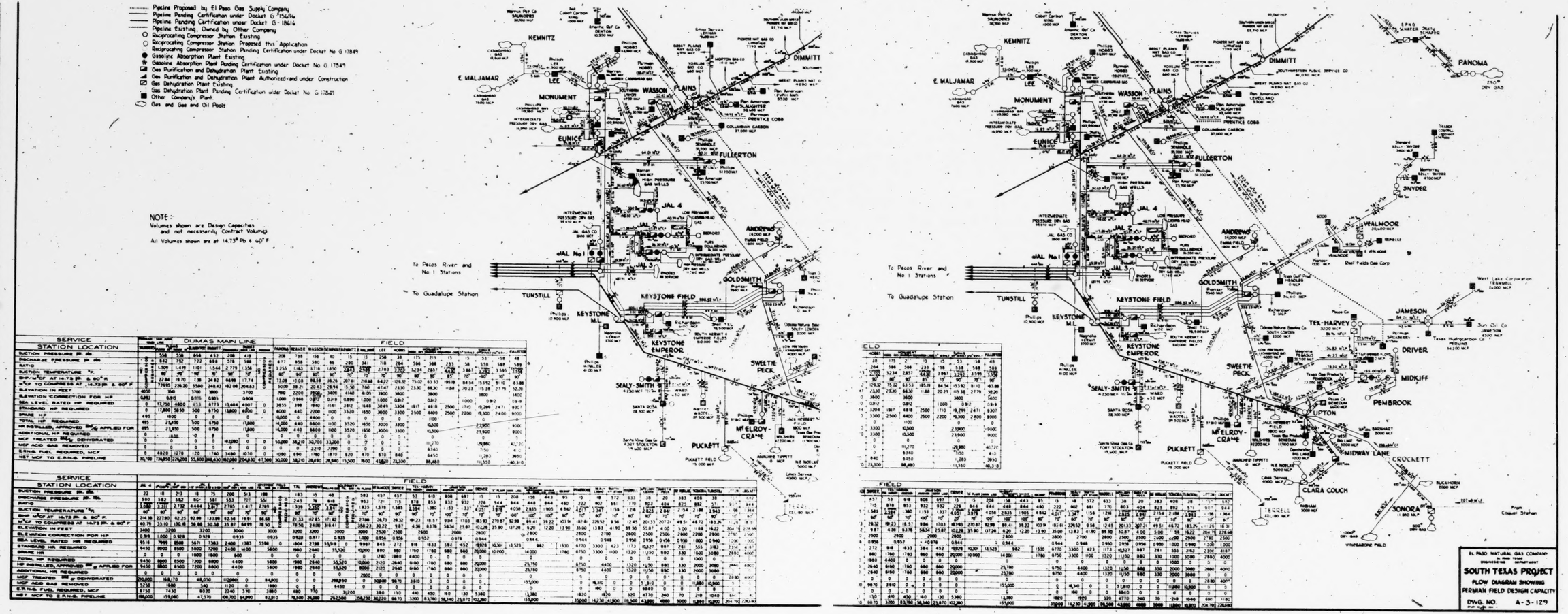
Richardson
Phillips
Warren



SERVICE	DUMAS MAIN LINE							FIELD																	
STATION LOCATION								PANOMA	BEAVER	WASSON	SEMINOLE	ZUMWALT	E. MAL JAMAR	LEE	HOBBS										FULLERTON
SUCTION PRESSURE PSI ABS	208	138	156	40	15	15	15	258	38	175	215	15	15	53	158	48									
DISCHARGE PRESSURE PSI ABS	871	858	880	866	880	880	880	880	880	880	880	880	880	880	880	880									
RATIO	3.255	5.162	5.718	21.650	58.667	58.667	58.667	3.410	23.158	5.023	4.093	58.667	58.667	16.615	5.582	18.333									
SUCTION TEMPERATURE °F	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°									
BHP/MCF AT 14.73 PSI & 60°F	22.84	19.70	1.38	24.82	98.98	17.74		73.08	10.08	86.59	16.26	20.74	298.88	84.22	128.32	75.02	83.33	190.98	84.54	153.92	81.10	61.88			
MCF TO COMPRESS AT 14.73 PSI & 60°F	0	77,985	226,210	5560	248,43	162 08	204,63	50.00	38.21	20.43	28.94	15.50	7.80	41.41	23.30	23.30	66.30	1.88	20.23	115.38	27.79	10.20			
ELEVATION IN FEET	4032	3168		3700	3880		3700	2980	2200	3500	3400	4140	4190	3900	3600				3600						
ELEVATION CORRECTION FOR HP	0.893	0.915		0.885			0.906	1.000	0.968	0.877	0.898	0.898	1.000	0.892					0.892			0.919			
SEA LEVEL RATED HP REQUIRED	0	17,750	4800	633	8773	13,444	4007	0	3855	398	7840	4141	3892	1848	3049	3304	1917	4418	2500	1710	19,299	2471	9307		
STANDARD HP REQUIRED	0	17,800	5630	500	8750		13,800	4,000	440	2,000	7,000	3520	1850	3000	3300	2500	6400	2500	2200	19,300	2400	9000			
SPARE HP	495	1800		0	0		0	10,000	0	4400	0	0	0	0	0		1000			1892		0			
TOTAL HP REQUIRED	495	21,650	500	8750		17,800		14,000	440	8800	1100	3520	1850	3000	3300		13,500			23,900		9300			
HP INSTALLED, APPROVED BHP APPLIED FOR	495	21,650	500	8750		17,800		14,000	440	8800	1100	3520	1850	3000	3300		13,500			23,900		9300			
ADDITIONAL HP REQUIRED	0	3,850	0	0		4,000		0	0	2,210	2,790	0	0	0	0		8,340			7,150		4,000			
MCF TREATED BHP DEHYDRATED	0	4820	1270	120	1740	3480	1030	0	1090	780	1870	920	470	870	840		8450			1,282		3650			
MCF ACID GAS REMOVED	0	0	0	0		0		0	0	0	0	0	0	0	0		11,270			29,980		40,220			
E.P.N.G. FUEL REQUIRED, MCF	0	4820	1270	120	1740	3480	1030	0	1090	780	1870	920	470	870	840		8450			1,282		3650			
NET MCF TO E.P.N.G. PIPELINE	30,198	736,850	226,200	55,600	248,430	162,080	204,830	47,500	50,000	38,210	26,890	26,840	15,500	7600	41,600	25,300		98,480		111,550		40,310			

SERVICE	FIELD																								
STATION LOCATION																									
SUCTION PRESSURE PSI ABS	657	53	618	808	697	15	15	208	158	443	93	15	18	572	633	38	20	383	408	38					
SUCTION PRESSURE PSI ABS	715	878	853	932	932	226	844	844	844	844	844	460	222	802	881	170	803	404	823	892	57				
RATIO	1.089	16.547	1.378	1.153	1.337	15.067	5.476	4.058	2.835	1.905	4.842	4.017	3.347	1.358	1.218	4.823	1.454	2.754	2.184	1.343	16.842				
SUCTION TEMPERATURE °F	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°				
BHP/MCF AT 14.73 PSI & 60°F	21.33	102.85	171.62	2788	26.73	29.32	99.23	18.57	9.84	17.03	48.93	270.87	92.98	99.41	39.22	103.91	82.81	29.52	9.56	12.45	201.33	207.21	49.5	46.72	183.25
MCF TO COMPRESS AT 14.73 PSI & 60°F	19.56	24.80	318.41	4.56	8.378	58.34	25.87	104.28	35.90	137.28	8.20	12.00	13.90	35.00	13.83	41.90	89.30	50.84	17.00	4.00	30.00	204.9	27.56	18.32	
ELEVATION IN FEET	3000	3200		3200		3000		3000	3200	3000		3000	2500	2500	2600		2700		2800	2500	2600	2600	2500	2600	2700
ELEVATION CORRECTION FOR HP	0.916	1.000	0.928	0.920		0.935		0.935	0.928	0.977		0.935	1.000	0.956	0.956		0.952		0.978		0.944				
SEA LEVEL RATED HP REQUIRED	15.15	7595	8500	5671	7383	2,400	3,983	5598	404	2788	5539	3,983	3,892	1,848	3,049	3,304	1,917	4,418	2,500	1,710	19,299	2,471	9,307		
STANDARD HP REQUIRED	9450	8000	8500	5800	7200	2400	4400	5600	1980	2640	5520	4000	3880	1860	3060	3300	1920	4400	0	1760	19,300	2,400	9,000		
SPARE HP	0	0		1800	1800									0	1240	1980	4400	0	0	0	0	0	0		
TOTAL HP REQUIRED	9450	8000	8500	7200	8800	4400		5600	1980	2640	5520	4000	3880	1860	4300	5280	6320	4400	0	1760	19,300	2,400	9,000		
HP INSTALLED, APPROVED BHP APPLIED FOR	9450	8000	8500	7200	8800	4400		5600	1980	2640	5520	4000	2120	2640	4300	5280	6320	4400	0	1760	19,300	2,400	9,000		
ADDITIONAL HP REQUIRED	0	0	0	0	0	0	0	0	0	0	0	0	1760	0	0	0	0	0	0	0	0	0	0		
MCF TREATED BHP DEHYDRATED	290,000	168,170		68,050	112,980	0	84,800	0	0	0	288,950	0	30,900	99,170	39,110	0	0	0	0	0	0	0	29,110	0	
MCF ACID GAS REMOVED	5230	1680		340	1120	0	1680	0	0	6430	0	0	0	0	0	0	0	0	0	0	15,000	0	0	0	
E.P.N.G. FUEL REQUIRED, MCF	8730	7430		620	2240	370	3180	480	170	0	3,200	370	310	490	430	540	1,380	1820	320	4770	260	70	218	1640	680
NET MCF TO E.P.N.G. PIPELINE	285,000	159,060		67,570	108,700	64,090	82,810	79,500	24,080	282,500	258,200	30,220	99,170	3200	83,780	58,140	23,470	102,280	13,000	14,230	11,000	99,500	43,880	4000	5000

This System Map tipped into back of
this volume to facilitate binding

812

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Filed June 1, 1960

Docket No. CI-60-693

In the Matter of

LO-VACA GATHERING CO.

Application for Certificate of Public Convenience and Necessity.

* * * * * * * * * * *

813

Comes now, Lo-Vaca Gathering Co. (Lo-Vaca) and makes application, pursuant to the provisions of Section 7 of the Natural Gas Act, as amended, and in accordance with the provisions of Section 154.91 and Sections 157.23-157.28 of the Commission's Regulations under the Natural Gas Act, for a certificate of public convenience and necessity covering the sale of natural gas as follows:

I

The exact legal name of this applicant is Lo-Vaca Gathering Co. It is a corporation organized under the laws of the State of Texas and is authorized to do business in the State of Texas. Its principal place of business is at Corpus Christi, Texas, and the names, titles, and post office addresses of the persons to whom correspondence and communications in regard to this application are to be addressed are:

Jack Ware
Vice President and General Attorney
Lo-Vaca Gathering Co.
Post Office Drawer 521
Corpus Christi, Texas

Bradford Ross
Ross, Marsh & Foster
725-15th Street, N. W.
Washington 5, D. C.

II

By this application, Lo-Vaca seeks certificate authorization for the gathering and delivery of gas for sale to El Paso Natural Gas Company (El Paso). Such gas will be delivered to El Paso at a point in Live Oak County, Texas, and will be gathered in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, pursuant to the terms of agreements between Lo-Vaca and El Paso dated March 15, 1960 and May 16, 1960, copies of which are attached hereto as Exhibits B-1 and B-2.

III

Lo-Vaca requests authorization to do the things and perform the acts under the terms of the contracts attached hereto as Exhibits B-1 and B-2 and made a part of this application, which include the gathering and delivery of an anticipated fifty million (50,000,000) cubic feet of natural gas per day at 14.65 psia to El Paso under the contract dated March 15, 1960, and for the gathering and sale of an additional anticipated fifty

million (50,000,000) cubic feet per day at 14.65 psia to El Paso pursuant to the contract dated May 16, 1960. Said

volumes of gas to be sold to El Paso by Lo-Vaca are purchased from various producers in the counties heretofore mentioned as listed in Exhibit B-3 attached. Lo-Vaca plans to construct facilities to gather the volumes of gas purchased at central points on the leases or in the vicinity of the fields. All gas will be gathered and delivered by Lo-Vaca to the El Paso Gas Supply Company (Transporter) at a point or points in Live Oak County, Texas, as indicated on the map attached as Exhibit A, where title and responsibility for the gas passes to El Paso. Transporter will receive said gas for the account of El Paso.

IV

The route or routes of the gathering facilities, under which such gathering and delivery and sale of natural gas will be accomplished, are shown on the map attached hereto as Exhibit A and made a part of this application. Lo-Vaca proposes to construct a gathering system to connect with numerous reserves of gas and accumulate sufficient volumes for delivery to the interstate pipeline purchaser to meet its obligations under the contracts attached hereto as Exhibits B-1 and B-2.

V

Lo-Vaca does not propose to serve natural gas to any community, either at wholesale or retail, in conjunction with

the deliveries and sale of natural gas contemplated herein, nor does it propose to deliver gas to any mainline industrial customer, except its delivery of gas to El Paso for its own industrial use.

(816)

VI

No major appurtenant property or facilities are to be constructed in conjunction with the gathering and sale of natural gas contemplated herein.

VII

The producers listed in Exhibit B-3 from which Lo-Vaca will purchase gas, and El Paso to whom Lo-Vaca will sell the gas purchased, and Transporter to whom Lo-Vaca will deliver the gas, have informed Lo-Vaca that they have or will in the immediate future file applications for certificates of public convenience and necessity before this Commission for necessary authorizations. Reference is hereby made to the contracts, covering the producer sales to Lo-Vaca, which will be filed by such producers and will set forth the terms and provisions governing Lo-Vaca's purchases of gas.

VIII

Attached hereto, as Exhibit C, are contract summaries containing the essential provisions of Lo-Vaca's contracts for the sale of gas to El Paso.

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IX

It would be in the public interest, and in the interest of Lo-Vaca and El Paso, for this Commission to omit the intermediate decision procedure with respect to this application. Lo-Vaca hereby waives oral hearing and opportunity for filing exceptions to the decision of the Commission, and respectfully requests that this application be handled under the shortened procedure provided for in Section 1.32 of the Commission's Rules of Practice and Procedure.

X

Pending determination upon this application for a certificate, a temporary certificate is requested under the applicable regulations for the purpose of permitting Lo-Vaca to construct the necessary facilities and provide the additional gas supplies which El Paso seeks.

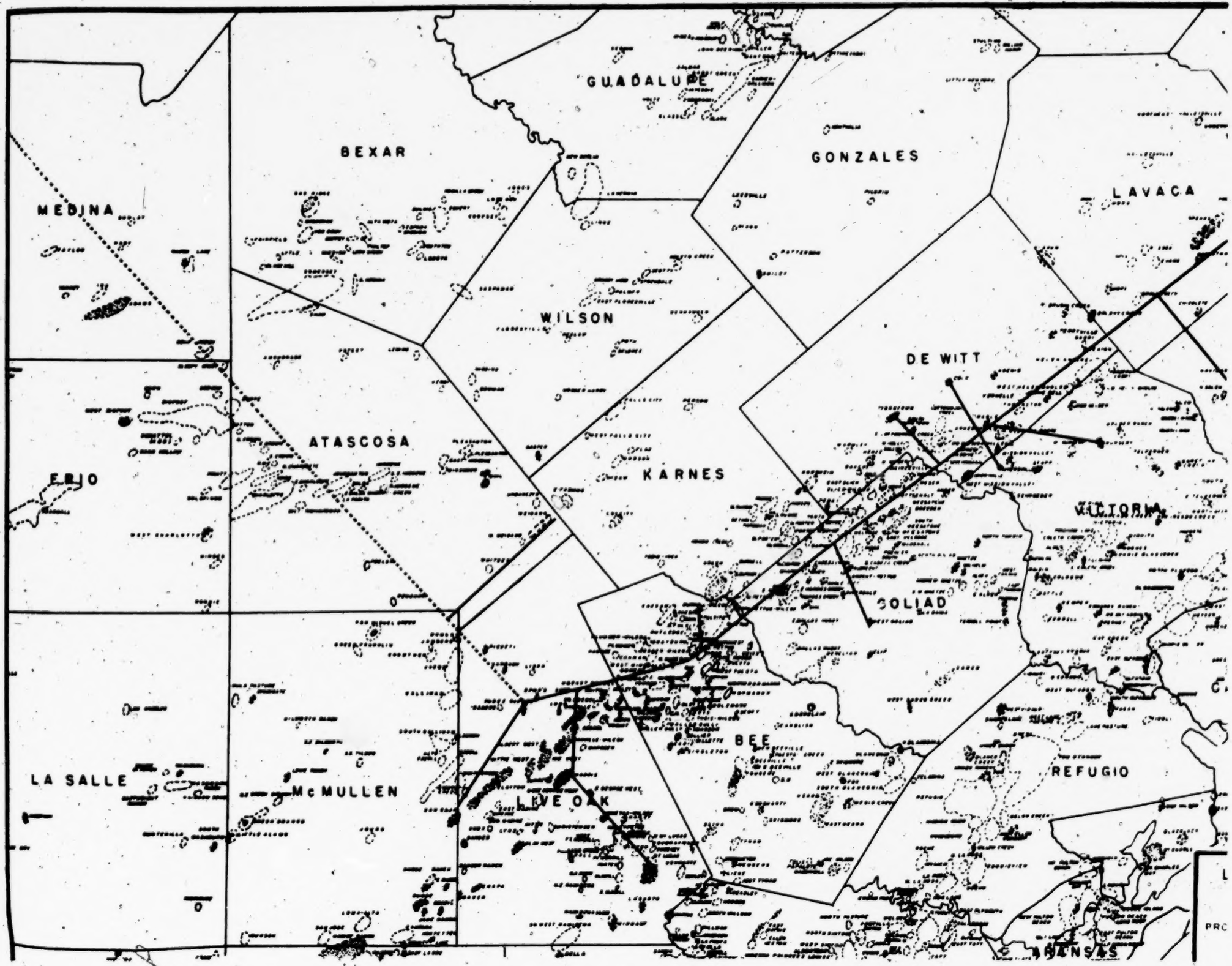
Wherefore, Lo-Vaca Gathering Co. prays that the Federal Power Commission authorize it to gather, deliver, and sell volumes of natural gas to El Paso Natural Gas Company in the manner described herein. Lo-Vaca further prays that the Commission grant the above-requested authorization at the earlies practicable date.

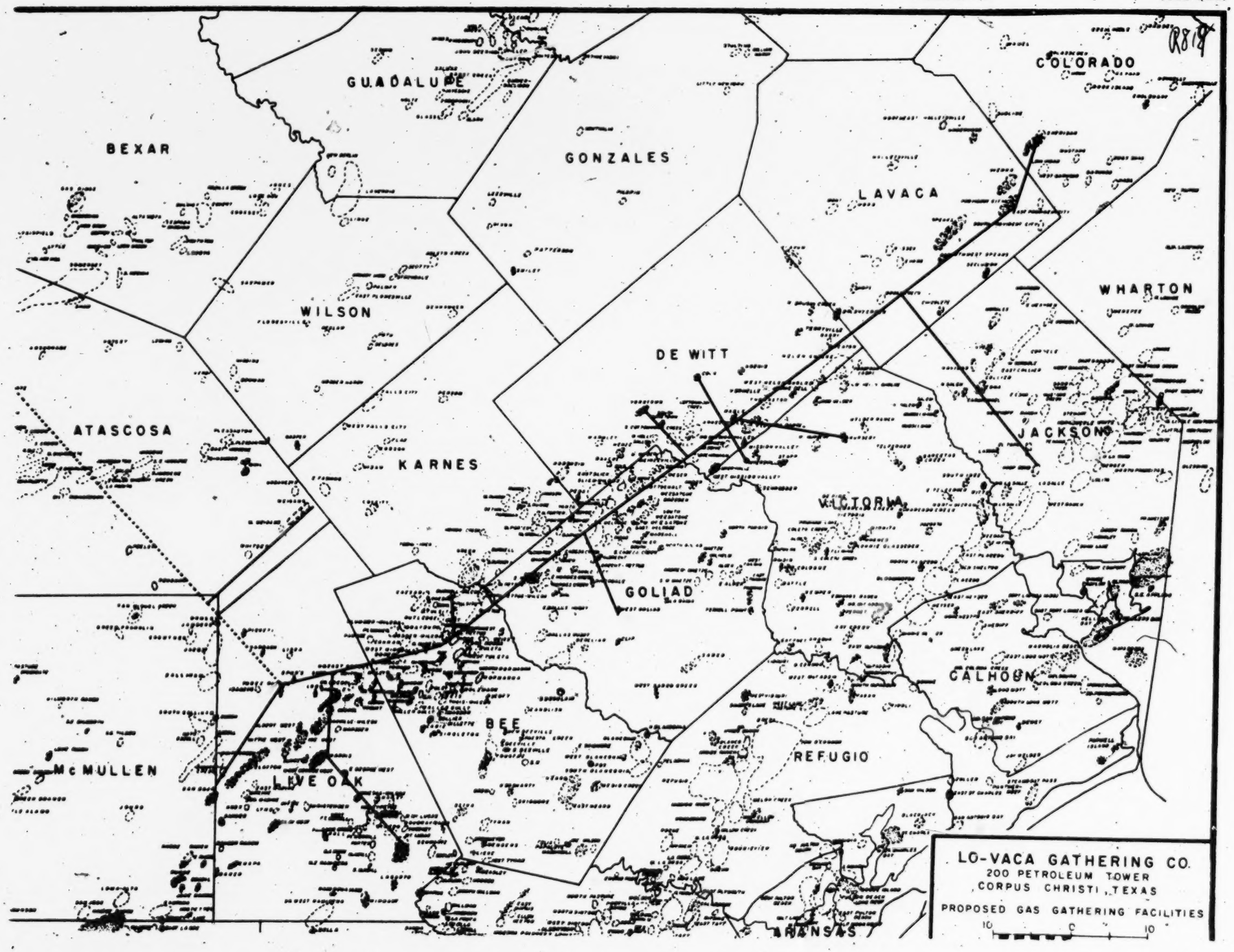
Respectfully submitted,

Lo-Vaca Gathering Co.
By /s/ Bradford Ross
Bradford Ross
Its Attorney

Dated at Washington, D. C.
this 1st day of June, 1960.

Exhibit


GUADALUPE
BEXAR
GONZALES
LAVACA
MEDINA
WILSON
DE WITT
ATASCOSA
KARNES
VICTORIA
ERIO
GOLIAD
BEE
LA SALLE
McMULLEN
LIVE OAK
REFUGIO
ARANSAS


818
GUADALUPE
BEXAR
GONZALES
COLORADO
LAVACA
WILSON
WHARTON
DE WITT
ATASCOSA
KARNES
JACKSON
VICTORIA
GOLIAD
CALHOUN
BEE
McMULLEN
LIVE OAK
REFUGIO
ARANSAS
LO-VACA GATHERING CO.
200 PETROLEUM TOWER
CORPUS CHRISTI, TEXAS
PROPOSED GAS GATHERING FACILITIES
10 0 10

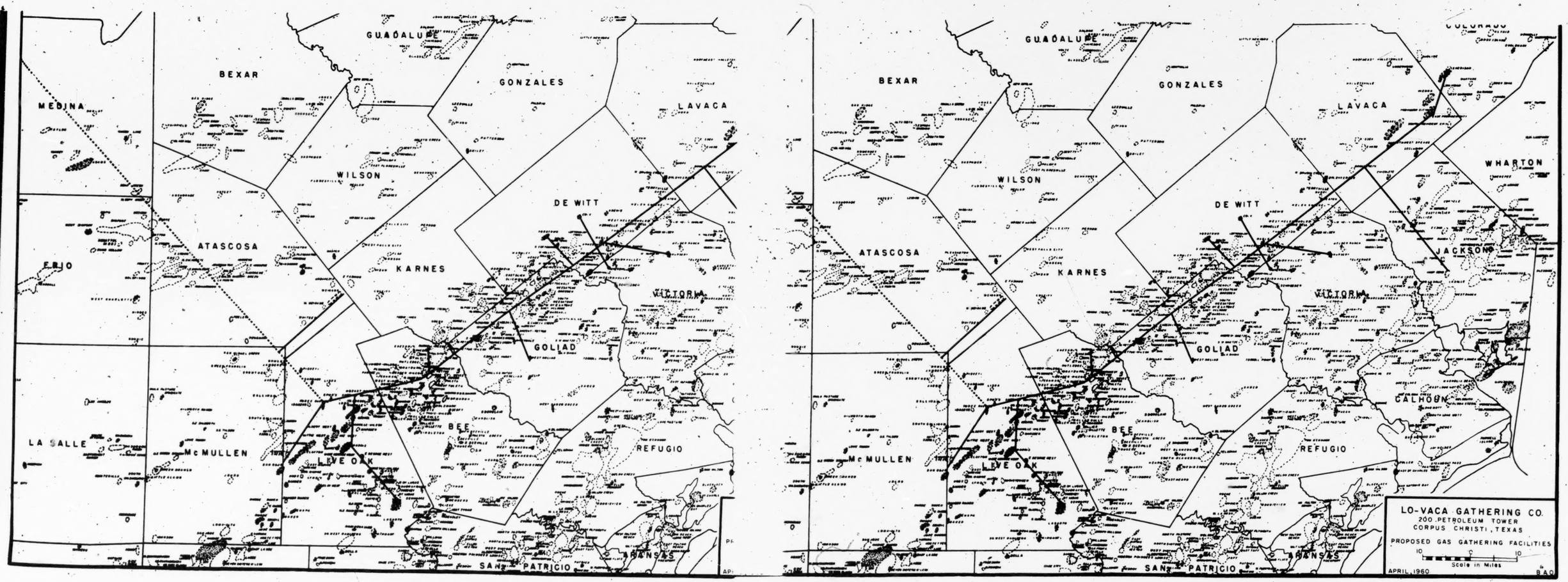

GUADALUPE
BEXAR
GONZALES
LAVACA
MEDINA
WILSON
DE WITT
ATASCOSA
KARNES
VICTORIA
GOLLAD
LA SALLE
McMULLEN
BEE
LIVE OAK
REFUGIO
SAN PATRICIO
ARANSAS
WHARTON
JACKSON
CALHOUN
LO-VACA GATHERING CO.
200 PETROLEUM TOWER
CORPUS CHRISTI, TEXAS
PROPOSED GAS GATHERING FACILITIES
10 0 10
Scale in Miles
APRIL, 1960

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Exhibit B-1

Gas purchase agreement dated March 15, 1960, between El Paso Natural Gas Company, buyer, and Lo-Vaca Gathering Co., seller.

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GAS PURCHASE AGREEMENT

dated March 15, 1960

between

EL PASO NATURAL GAS COMPANY

Buyer

and

LO-VACA GATHERING CO.

Seller

covering gas produced in South Texas

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THIS AGREEMENT, made and entered into on this the 15th day of March, 1960, by and between EL PASO NATURAL GAS COMPANY, a Delaware corporation, hereinafter called "El Paso", and LO-VACA GATHERING CO., a Texas corporation hereinafter called "Gatherer",

WITNESSETH:

That in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

ARTICLE I

Definitions

Section 1. The term "dedicated reserves" as used in this agreement shall mean the natural gas reserves

dedicated by Gatherer to the performance of this agreement as provided in Article II hereof.

Section 2. The term "day" as used in this agreement shall mean a period of twenty-four (24) consecutive hours beginning and ending at seven (7:00) o'clock A.M.

Section 3. The term "month" as used in this agreement shall mean the period beginning at seven (7:00) o'clock A.M. on the first day of a calendar month and ending at seven (7:00) o'clock A.M. on the first day of the next succeeding calendar month.

Section 4. The term "year" as used in this agreement, except as used in Articles X and XIII, shall mean the period beginning at seven (7:00) o'clock A.M. on the first day of a

calendar year and ending at seven (7:00) o'clock A.M. on the first day of the next succeeding calendar year; provided, however, that the period from the date of first deliveries of gas hereunder, or from the date such deliveries are required to begin, as the case may be, until the first day of the next succeeding calendar year shall be deemed to be a year, and the period from seven (7:00) o'clock A.M. on the first day of the last calendar year during the term of this agreement until seven (7:00) o'clock A.M. on the day next succeeding the day when this agreement terminates shall be demed to be a year.

Article II

Dedication

Section 1. On or before May 1, 1960, Gatherer shall dedicate to the performance of this agreement natural gas reserves in the Texas Gulf Coast area having an aggregate initial volume equal to or exceeding four hundred (400)

billion cubic feet. Dedication of a reserve of natural gas to the performance of this agreement shall occur when Gatherer shall submit to El Paso in writing (a) an accurate description of such natural gas reserve, (b) copies of the contract or other instrument evidencing Gatherer's prior right to withdraw the gas in such reserve and sell and deliver the same to El Paso under this agreement, and (c) a statement executed by Gatherer to the effect that such reserve is dedicated to the performance of this agreement. The aggregate initial volume of the dedicated reserves shall be determined, and redetermined from time to time, as provided in Article XIV of this agreement.

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If the initial determination of the aggregate initial volume of the dedicated reserves shall disclose that such volume is less than four hundred (400) billion cubic feet, Gatherer shall forthwith obtain and dedicate to the performance of this agreement such additional quantity of gas reserves as may be necessary to cause the aggregate initial volume of the dedicated reserves to equal or exceed four hundred (400) billion cubic feet. If, however, after the initial determination any redetermination of the aggregate initial volume of the dedicated reserves shall disclose that such volume is less than four hundred (400) billion cubic feet, Gatherer shall be obligated only to exercise its best efforts to obtain without economic loss and under reasonable terms and conditions and dedicate to the performance of this agreement such additional quantity of gas reserves as may be necessary to cause the aggregate initial volume of the dedicated reserves to equal or exceed four hundred (400) billion cubic feet.

Section 2. Withdrawals of gas from the dedicated reserves during any month must not exceed deliveries made by Gatherer to El Paso during such month under the pro-

visions of this agreement. By written agreement between Gatherer and El Paso dedicated reserves may be released from this agreement if other gas reserves satisfactory to El Paso are substituted in lieu thereof, in which case such other gas reserves shall become dedicated reserves hereunder.

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ARTICLE III

Governmental Authority

Section 1. El Paso and Gatherer shall, as soon as possible and in any event not later than June 1, 1960, make such applications and filings to and with the Federal Power Commission as may be required on the part of each such respective party in order to procure such Certificate of Public Convenience and Necessity as is necessary for the construction, ownership and operation by such party of the facilities necessary for it to effect delivery or receipt of gas hereunder or otherwise necessary for such party to perform its obligations under this agreement. Each party making such applications shall prosecute the same with diligence to final disposition by the Federal Power Commission and shall promptly notify the other party in writing of the final action taken thereon by the Federal Power Commission.

Section 2. If any Certificate of Public Convenience and Necessity referred to in Section 1 of this article shall be denied, this agreement shall thereupon terminate, and neither party hereto shall thereafter have any liability under this agreement to the other.

Section 3. If any Certificate of Public Convenience and Necessity referred to in Section 1 of this article shall be issued in form and substance unreasonably burdensome to the party receiving the same, such party shall have the

right, at its option, to cancel this agreement by giving the other party written notice of such cancellation within thirty (30) days after the final order issuing

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such certificate. In case any such notice is given, this agreement shall terminate upon the giving of such notice, and neither party shall thereafter have any liability under this agreement to the other. Acceptance by either party of emergency or temporary Certificates of Public Convenience and Necessity, even though the party accepting the same shall act thereunder, shall not, within the meaning of this article, constitute receipt of a Certificate of Public Convenience and Necessity in form and substance satisfactory to such party unless such party shall notify the other party in writing that it waives all objections to the form or nature of the same.

Section 4. When the Certificates of Public Convenience and Necessity contemplated in this article have been issued and accepted by the respective parties receiving the same, each of such parties shall promptly commence, and thereafter prosecute to completion, the design, acquisition of materials and rights-of-way for and construction of the facilities necessary for it to perform its obligations under this agreement.

ARTICLE IV

Quantity

Section 1. Commencing as of the earlier of:

(a) The date of completion of all of the facilities referred to in Section 4 of Article III of this agreement, or

(b) July 1, 1961, or such later date as Gatherer shall complete its said facilities and stand ready to

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deliver gas to El Paso under this agreement, Gatherer shall sell and deliver to El Paso from the dedicated reserves, and El Paso shall receive from Gatherer from the dedicated reserves and pay for, or pay for whether or not received, during each year, subject to the provisions of Section 2 of this Article IV, a minimum quantity of natural gas per day determined as provided in Article XIV of this agreement. Such minimum quantity shall be averaged over each year. In addition, El Paso shall have the right to purchase and receive from Gatherer such additional quantity of gas from the dedicated reserves as El Paso may desire, and Gatherer shall sell and deliver the same to El Paso; provided, however, that Gatherer shall not be obligated during any day to sell and deliver to El Paso under the terms of this agreement more than one hundred thirty three percent (133%) of the minimum daily quantity of gas as last determined pursuant to the provisions of Article XIV of this agreement.

Section 2. Should El Paso fail to purchase and receive from Gatherer during any year the minimum quantity of gas which El Paso was required to purchase and receive from Gatherer during such year pursuant to the provisons of this Article IV, which failure was not due to physical nonavailability of gas, causes within the control of Gatherer, regulation by governmental authority or force majeure intervention, then within thirty (30) days after the end of such year El Paso shall pay Gatherer for that quantity of gas (called "unreceived quantity" in this section) which represents the difference between the minimum quantity of gas which

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El Paso was required hereunder to purchase and receive from Gatherer during such year and the quantity of gas

actually purchased and received by El Paso from Gatherer hereunder during such year. Payment shall be made at the weighted average price paid by El Paso hereunder for gas during such year. If in any year El Paso fails to purchase and receive from Gatherer during such year the minimum quantity of gas which El Paso was required to purchase and receive from Gatherer during such year pursuant to the provisions of this Article IV, El Paso shall have the right at any time during the next four (4) succeeding years to take and receive the quantity of gas (called "make up gas" in this section) which it paid for but did not receive during the year when such deficiency occurred; provided, however, that (a) the quantity of gas so taken by El Paso shall not be treated as a part of the minimum quantity of gas which El Paso is obligated to purchase and receive hereunder during any of such succeeding years and (b) the provisions of this section shall not operate to increase the maximum daily quantity of gas which Gatherer is obligated to deliver to El Paso hereunder, and (c) the provisions of this section shall not operate to extend the term of this agrement. El Paso shall not be required to pay Gatherer for make up gas unless at the time such make up gas is received the price in effect under this agreement is higher than the price paid by El Paso for the corresponding unreceived gas, in which case El Paso shall pay Gatherer for the make up gas a price per one thousand (1,000) cubic feet equal to the difference between the price per one thousand (1,000) cubic feet then in effect

under this agreement and the price per one thousand (1,000) cubic feet paid for the unreceived gas.

Section 3. In the event that on any day the deliveries of gas by Gatherer to El Paso hereunder are, (1) by reason

of physical nonavailability of gas, (2) causes within the control of Gatherer, (3) regulation by governmental authority or, (4) force majeure intervention, less than one hundred thirty three percent (133%) of the minimum daily quantity then in effect hereunder, then in determining for the purposes of Section 2 of this article the average daily volume of gas taken by El Paso hereunder during the year in which such day occurs, there shall be taken, in lieu of the volume of gas (if any) actually delivered by Gatherer to El Paso during such day, a volume of gas equal to one hundred thirty three percent (133%) of the minimum daily quantity then in effect hereunder, or the quantity of gas El Paso desired to take, whichever is the lesser.

Section 4. In addition to the quantities herein provided, in the event Gatherer from time to time has excess gas available, Gatherer may, upon its option, offer to sell and deliver such gas to El Paso and El Paso, upon its option, may receive such excess gas and same shall be deemed delivered under this contract and shall be paid for at the applicable price as provided in Article X.

Article V

Quality

All gas delivered by Gatherer to El Paso under the terms of this agreement shall be natural gas and shall conform to the following specifications (determination as to conformity of the gas with these specifications shall be made in accordance with the generally accepted procedures of the industry):

(a) *Liquids:* The gas shall be free from hydrocarbons and water in liquid form at the temperature and pressure at which delivered.

(b) *Hydrogen Sulphide:* The gas shall not contain more than one (1) grain of hydrogen sulphide per one hundred (100) cubic feet.

(c) *Organic Sulphur:* The gas shall not contain more than twenty (20) grains of organic sulphur (mercaptans) per one hundred (100) cubic feet.

(d) *Carbon Dioxide:* The gas shall not have a carbon dioxide content in excess of two per cent (2%) by volume.

(e) *Dust, Gums, etc.:* The gas shall be commercially free of dust, gums and other solid matter.

(f) *Heating Value:* The total gross heating value of the gas delivered hereunder shall not be less than one thousand (1,000) British thermal units per cubic foot.

Article VI

Delivery Point and Pressure

Section 1. The point of delivery for all gas to be sold and delivered hereunder shall be a point in the immediate vicinity of Three Rivers, Texas, to be selected by agreement between El Paso and Gatherer and such other point or points as may be mutually agreed on by the parties hereto.

Section 2. Title to and ownership of the gas delivered hereunder shall pass to and vest in El Paso at the point of delivery. Gatherer shall be solely liable and responsible for said gas prior to the time of delivery thereof to El Paso, and El Paso shall be solely liable and responsible therefor thereafter.

Section 3. Gatherer shall deliver the gas to El Paso at the delivery point at such varying pressures as El Paso may require; provided, however, that Gatherer shall not be obligated

to deliver the gas at a pressure in excess of five hundred fifty pounds (550#) per square inch gauge.

ARTICLE VII

Meters

Section 1. El Paso, at its sole cost and expense, shall install, maintain and operate at the delivery point a standard type orifice meter or meters for the measuring of the quantity of gas delivered hereunder. Orifice meters shall be installed and operated in accordance with the specifications prescribed in Gas Measurement Committee Report No. 3, dated April, 1955, of the Natural Gas Department of the American Gas Association. El Paso shall cause the charts on such meters to be changed each day. The respective meter, meter readings and meter charts shall be accessible at all reasonable times to inspection and examination by Gatherer.

Section 2. From time to time and at least once in each three (3) months, the accuracy of El Paso's measuring equipment shall be verified by and at the expense of El Paso. If either party at any time shall notify the other that it desires a special test of any meter, the other party shall cooperate to secure an immediate verification of the accuracy of such meter and joint observation of any adjustments. If any such test shall be requested by Gatherer, and upon such test, the measuring equipment shall be found to be registering correctly, the cost of such test shall be charged to Gatherer, otherwise the cost of all such tests shall be borne by El Paso. El Paso shall give notice to Gatherer of the time of all tests in order that Gatherer may

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conveniently have its representative present. Reading, calibration and adjustment of El Paso's meters and changing of charts shall be done only by El Paso.

Section 3. If, upon any test, the percentage of inaccuracy shall be two per cent (2%) or more, the registration of such meter shall be corrected at the rate of such inaccuracy for any period which is definitely known or agreed upon, but in case the period is not definitely known or agreed upon, then for a period extending back one-half (½) of the time elapsed since the date of the last calibration. Following any test, metering equipment found inaccurate shall be immediately restored by El Paso as closely as possible to a condition of accuracy. If, for any reason, any meter is out of service or out of repair so that the amount of gas delivered cannot be estimated or computed from the reading thereof, the amount of gas delivered through the period such meter is out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available using the first of the following methods which is feasible:

a. By correcting the error if the percentage of error is ascertainable by calibration test or mathematical calculation.

b. By using the registration of Gatherer's check meter if installed and accurately registering.

c. By estimating the quantity of deliveries during preceding periods under similar conditions when the meter was registering accurately.

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Section 4. Gatherer may, at its option and expense, install and operate a check meter to check El Paso's meter, but measurement of gas for the purpose of this agreement

shall be by El Paso's meter, except as hereinabove specifically provided to the contrary. Such check meter and equipment shall be so installed as not to interfere with the operation of the meter or meters to be installed and maintained by El Paso at or near the point of delivery, as provided for in Section 1 of this Article VII.

ARTICLE VIII

Unit of Volume

Section 1. The unit of volume for all purposes hereunder (except for computation of "quality" values under the provisions of Article V) shall be one (1) cubic foot at an absolute pressure of fourteen and sixty-five hundredths pounds (14.65#) per square inch at a temperature of sixty (60) degrees Fahrenheit.

Section 2. The unit of volume for the determination of heating value under subparagraph (f) of Article V hereof shall be the amount of gas, saturated with water vapor, which would occupy a volume of one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under a pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

Section 3. The unit of volume for determination of quality values under subparagraphs (b) and (c) of Article V hereof shall be one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under a pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

ARTICLE IX

Measurement

Section 1. All measurement of gas hereunder shall be in accordance with the recommendations for measuring

gas contained in Report No. 3 of the Gas Measurement Committee of the American Gas Association, dated April, 1955, applied in a practical and appropriate manner, and correction shall be made for deviation from Boyle's Law.

Section 2. The temperature of the gas flowing through the meter or meters to be installed and maintained by El Paso at the delivery point or points shall be determined by the use of a recording thermometer of standard manufacture installed by El Paso so that it may properly record such temperature. The arithmetical average of the twenty-four (24) hour record, or of that portion of the twenty-four (24) hours during which gas was passing, if gas had not been passing during the entire period, from the recording thermometer shall be taken to be the gas temperature for the day and shall be used to make proper corrections in volume computations.

Section 3. The specific gravity of the gas delivered hereunder shall be determined by the use of a recording gravitometer to be installed, maintained and operated by El Paso at each delivery point. The arithmetical average of the hourly specific gravity during each twenty-four (24) hour period, or during that period which gas was actually passing, shall be used to make proper computations.

Section 4. The gross heating value of the gas shall be determined by El Paso at intervals of three (3) months or by means of a recording calorimeter of the Thomas type, at the option of El Paso.

Article X

Price

Section 1. The price to be paid by El Paso to Gatherer per one thousand (1,000) cubic feet for all natural gas sold hereunder shall be as follows:

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(a) For the four (4) year period commencing on the date specified in Section 1 of Article IV of this agreement, twenty-two cents (22¢).

(b) For the next four (4) year period, twenty-three cents (23¢).

(c) For the next four (4) year period, twenty-four cents (24¢).

(d) For the next four (4) year period, twenty-five cents (25¢).

(e) For the next four (4) year period, twenty-six cents (26¢).

Section 2. It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale. If this sale should become subject to the jurisdiction of the Commission and the Commission should at any time order a reduction in the contract prices herein, then El Paso

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agrees that Gatherer may subsequently, at its option, file for such higher price as Gatherer may feel is justified, providing for but not exceeding the revenues to which Gatherer is entitled as provided in this Article X hereof.

ARTICLE XI

Billing and Payment

Section 1. On or before the tenth (10th) day of each calendar month, El Paso shall render to Gatherer a statement showing the amount of gas purchased by El Paso hereunder during the preceding calendar month, and payment for such gas shall be made by El Paso to Gatherer

on or before the twenty-fifth (25th) day of the calendar month in which such statement is rendered. Any errors in such statement or payment shall be promptly reported to El Paso, and El Paso shall make proper adjustment thereof within thirty (30) days after final determination of the correct volume or values involved; provided, however, that if no such errors are reported to El Paso within one (1) year from the date such statement or payment was submitted to Gatherer, the same shall be conclusively deemed to be correct.

Section 2. Upon request, El Paso shall furnish Gatherer the measurement charts applicable to any monthly statement. Gatherer shall return to El Paso all such charts within thirty (30) days after receipt, and Gatherer shall have access to El Paso's records and books at all reasonable hours so far as they pertain to the gas sold hereunder.

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ARTICLE XII

Taxes

Section 1. Subject to the other provisions of this article, Gatherer shall pay or cause to be paid all taxes and assessments imposed on Gatherer with respect to the gas delivered hereunder prior to its delivery to El Paso, and El Paso shall pay or cause to be paid all taxes and assessments imposed upon El Paso with respect to the gas delivered hereunder after its receipt by El Paso. Neither party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this agreement.

Section 2. Any sales, transaction, occupation, service, production, severance, gathering, transmission, export or excise tax, assessment or fee levied, assessed or fixed by

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the United States, the State of Texas, or other governmental authority and taxes of a similar nature, or equivalent in effect (not including income, excess profits, capital stock, franchise or general property taxes) in respect of or applicable to the gas delivered hereunder to El Paso in addition to or greater than those, if any, being levied, assessed or fixed on the date of this agreement in respect of or applicable to such gas and which Gatherer may be liable for, either directly or indirectly, or through any obligation to reimburse others, are hereinafter collectively referred to as an "additional tax" provided, however, that all existing taxes, up to the present respective rates thereof, now imposed on the parties hereto shall

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not be considered as an additional tax. It is expressly understood and agreed between the parties hereto that El Paso shall, subject to the conditions hereinafter set forth, pay to Gatherer three-fourths (3/4ths) of any such additional tax. Should Gatherer so become liable for any such additional tax, Gatherer shall notify El Paso immediately. Within ninety (90) days after the end of each calendar month, Gatherer shall prepare and submit to El Paso a statement setting forth the amount of any such additional tax that Gatherer has paid during such calendar month, and within thirty (30) days after submission of such statement, adjustment between the parties hereto shall be made by El Paso reimbursing Gatherer to the extent of three-fourths (3/4ths) of the amount of any such additional tax which Gatherer shall have so paid. The tax reimbursement herein provided for shall apply to the total amount of money Gatherer is required to pay by virtue of any such additional tax but shall not apply to any delinquent interest or penalty payments that may

be applicable to any such additional tax. Taxes applicable to any royalty, overriding royalty, production payment or similar interest shall be considered to be covered by the provisions of this Section 2 only if the reimbursement made by El Paso to Gatherer with respect thereto is passed on by Gatherer to the owner of such royalty, overriding royalty, production payment or similar interest.

ARTICLE XIII

Term

Subject to the other provisions of this agrement, this agreement shall be effective from the date hereof and shall continue

in force for a term of twenty (20) years from the date specified in Section 1 of Article IV of this agreement.

ARTICLE XIV

Gas Reserves

Section 1. As soon as may be reasonably practical El Paso and Gatherer shall conduct a joint study of the dedicated reserves to determine the quantity of recoverable gas contained therein. Upon demand of either party a similar study shall be conducted from time to time thereafter but not more often than once each two (2) years. Each such study shall give proper consideration to development, operating conditions, producing conditions, applicable orders, rules and regulations of regulatory authorities, and other relevant factors and shall determine as nearly as can be determined the quantity of gas then remaining on the date of such study which can thereafter be produced for delivery to El Paso under the provisions of this agreement. To the quantities so determined by the last such study shall be added the quantity

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of gas theretofore delivered to El Paso under this agreement. The quantity of gas arrived at by such addition is called the "aggregate initial volume" of the dedicated reserves in this article and in Article II of this agreement. For all purposes the volume of recoverable gas in the dedicated reserves shall be determined by calculations based on a terminal bottom hole pressure of five hundred pounds (500#) per square inch absolute or such lower pressure as El Paso and Gatherer may agree upon at the time of each dedication.

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Section 2. The number of billions of cubic feet of gas found by the last reserve study to constitute the aggregate initial volume of the dedicated reserves shall be divided by eight (8) and the quotient so obtained shall be multiplied by one million (1,000,000). The product of such multiplication shall be the number of cubic feet of gas which shall be the minimum daily quantity of gas, averaged over each year, which El Paso shall be obligated to purchase under the provisions of this agreement; provided, however, that such minimum daily quantity shall not exceed fifty million (50,000,000) cubic feet of gas; and, provided further, that if the aggregate initial volume of the dedicated reserves shall ever exceed four hundred (400) billion cubic feet, Gatherer shall have the right to deliver the excess over four hundred (400) billion cubic feet to others, subject to the conditions that: (a) such deliveries shall not interfere in any way with deliveries of gas to El Paso under this agreement and (b) the quantity of gas which can be so delivered to others shall be redetermined, and may be increased or decreased, at the time of each subsequent reserve study.

Section 3. If El Paso and Gatherer shall disagree as to any fact or facts to be determined by any joint study

mentioned in this article the same shall be determined by arbitration in the following manner:

El Paso shall appoint one competent geologist or reservoir engineer and Gatherer shall appoint one competent geologist or reservoir engineer and the two so appointed shall select a third competent geologist or reservoir engineer. If either El Paso or

Gatherer shall fail to appoint a geologist or reservoir engineer within ten (10) days after a request for such appointment is made by the other party in writing, or if the two geologists or reservoir engineers so appointed shall fail within ten (10) days after the appointment of the second of them to agree on a third geologist or reservoir engineer, the geologist or reservoir engineer necessary to complete a board of three geologists or reservoir engineers shall be appointed upon application by either party therefor by the United States District Judge, senior in point of service, of a Federal Judicial District in which some part of the property covered by this agreement is situated. In the event such judge shall fail or refuse to act, then either party hereto may request the American Arbitration Association to select the geologist or reservoir engineer to complete the board of three. After three geologists or reservoir engineers are appointed pursuant to the foregoing provisions of this article they shall meet, hear the parties with respect to the matter of said fact or facts, and arrive at a determination of said fact or facts. Any determination agreed to in writing by at least two of said geologists or reservoir engineers shall be final and binding on the parties hereto. All geologists or reservoir engineers appointed pursuant to this article shall be individuals experienced in the oil and gas industry and competent to pass on the matter of said

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fact or facts. The fees and expenses of the geologists or reservoir engineers shall be borne equally by the parties hereto.

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Section 4. Gatherer shall, from time to time, at El Paso's request, furnish to El Paso such geological, engineering and production data as may be available to Gatherer and as may be desired by El Paso for a study of the dedicated reserves and the deliverability thereof and which will enable El Paso to make and maintain currently its own reserve and deliverability studies.

ARTICLE XV

Title

Gatherer hereby warrants title to the gas sold by it hereunder and its right to sell the same and warrants that all such gas is owned by Gatherer free from all liens, encumbrances and adverse claims, including, but not limited to, liens to secure payment of production taxes, severance taxes and other taxes. As between El Paso and Gatherer, Gatherer shall at all times have the obligation to make settlement for all royalties, overriding royalties and other payments due to the owners of the mineral, royalty and other interests under the properties from which such gas is produced, as modified by such assignments, unitization agreements and other documents as may appear of record or otherwise be binding upon Gatherer or its predecessors in title, and to make settlements with all other persons having any interest in the gas (or the proceeds of the sale thereof) sold by Gatherer hereunder. Gatherer shall save and hold El Paso free and harmless from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of

adverse claims of any and all persons to the gas sold by it hereunder or to royalties, overriding

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royalties or other payments with respect thereto, or to taxes, licenses, fees or charges thereon which are applicable before the title to the gas passes to El Paso or which may be levied and assessed upon the sale thereof to El Paso, subject, however, to the other provisions of this agreement.

ARTICLE XVI

Use of Gas

All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

ARTICLE XVII

Force Majeure

Section 1. Except for El Paso's obligations to make payment for gas delivered hereunder, neither party hereto shall be liable for any failure to perform the terms of this agreement when such failure is due to "force majeure" as hereinafter defined. The term "force majeure" as employed in this agreement shall mean acts of God, strikes, lockouts or industrial disputes or disturbances, civil disturbances, arrests and restraint from rulers or people, interruptions by government or court orders, present and future valid orders of any regulatory body having proper jurisdiction, acts of the public enemy,

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wars, riots, blockades, insurrections, inability to secure labor or inability

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to secure materials, including inability to secure materials by reason of allocations promulgated by authorized governmental agencies, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or pipe lines, inability to obtain easements or rights-of-way, the making of repairs or alterations to pipe lines or plant or any other cause, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming "force majeure". Upon the occurrence of an event constituting "force majeure", the same shall, so far as possible, be remedied with all reasonable dispatch. The settlement of strikes or lockouts or industrial disputes or disturbances shall be entirely within the discretion of the party having the difficulty, and the above requirement that any "force majeure" shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or industrial disputes or disturbances by acceding to the demands of any opposing party therein when such course is inadvisable in the discretion of the party having the difficulty.

Section 2. It is understood that either party may, without liability to the other party, interrupt the operations of its plants or pipe line system for the purpose of making necessary alterations or repairs thereto, but that such interruptions shall be for only such time as may be reasonable. The party interrupting operations shall give the other party reasonable notice, except in case of emergency, or its intentions so to interrupt operations and of the

estimated time during which no gas will be taken or delivered, as the case may be.

ARTICLE XVIII

Rules and Regulations

This agreement is subject to all present and future valid laws and valid orders, rules and regulations of the United States, the State of Texas, or any duly constituted agency thereof.

ARTICLE XIX

Notices

All notices, statements and other communications required or permitted to be given hereunder shall be in writing and shall be deemed to have been effectively given when mailed by United States mail, postage prepaid and registered, addressed to Gatherer at Petroleum Tower, Corpus Christi, Texas, or to El Paso at P. O. Box 1492, El Paso, Texas, as the case may be, or to such other address as either party shall respectively hereafter designate in writing.

Notices of change of address of any of the parties shall be given in writing to the others in the manner aforesaid and shall be observed in the giving of all future notices, statements or other communications required or permitted to be given hereunder.

ARTICLE XX

Successors and Assigns

This agreement shall bind and benefit the parties hereto and their respective successors and assigns, provided that no conveyance or transfer of any interest of either party shall be

binding upon the other party until such other party has been furnished with written notice and true copy of such conveyance or transfer; provided, further, that either El Paso or Gatherer or both, may assign its right, title and interest in, to and by virtue of this agreement, including any and all extensions, renewals, amendments and supplements thereto, to a trustee or trustees individual or corporate, as security for bonds or other obligations or securities, without such trustee or trustees assuming or becoming in any respect obligated to perform any of the obligations of the assignor, and if any such trustee be a corporation, without its being required by the parties hereto to qualify to do business in the State of Texas.

ARTICLE XXI

Topical Headings

The topical headings used herein are inserted for convenience only and shall not be construed as having any substantive significance or meaning whatsoever or as indicating that all of the provisions of this agreement relating to any particular topic are to be found in any particular article.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed in duplicate originals, on this

the day and year first above written.

"BUYER"
EL PASO NATURAL GAS COMPANY
By D. H. TUCKER
Vice President

ATTEST:

M. PLUMMER
Assistant Secretary

"SELLER"
LO-VACA GATHERING CO.
By JACK WARE
Vice President

ATTEST:

M. J. ARNOLD
Assistant Secretary

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Exhibit B-2

Gas purchase agreement dated May 16, 1960, between El Paso Natural Gas Company, buyer, and Lo-Vaca Gatherir Co., seller.

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GAS PURCHASE AGREEMENT

dated May 16, 1960

between

EL PASO NATURAL GAS COMPANY
Buyer

and

LO-VACA GATHERING CO.
Seller

covering gas produced in South Texas

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THIS AGREEMENT, made and entered into on this the 16th day of May, 1960, by and between EL PASO NATURAL GAS COMPANY, a Delaware corporation, hereinafter called "El Paso", and LO-VACA GATHERING CO., a Texas corporation, hereinafter called "Gatherer",

WITNESSETH:

That in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

ARTICLE I

Definitions

Section 1. The term "dedicated reserves" as used in this agreement shall mean the natural gas reserves dedicated by Gatherer to the performance of this agreement as provided in Article II hereof.

Section 2. The term "day" as used in this agreement shall mean a period of twenty-four (24) consecutive hours beginning and ending at seven (7:00) o'clock A.M.

Section 3. The term "month" as used in this agreement shall mean the period beginning at seven (7:00) o'clock A.M. on the first day of a calendar month and ending at seven (7:00) o'clock A.M. on the first day of the next succeeding calendar month.

Section 4. The term "year" as used in this agreement, except as used in Articles X and XIII, shall mean the period

beginning at seven (7:00) o'clock A.M. on the first day of a calendar year and ending at seven (7:00) o'clock A.M. on the first day of the next succeeding calendar year; provided, however, that the period from the date of first deliveries of gas hereunder, or from the date such deliveries are requnired to begin, as the case may be, until the first day of the next succeeding calendar year shall be deemed to be a year, and the period from seven (7:00) o'clock A.M. on the first day of the last calendar year during the term of this agreement until seven (7:00) o'clock A.M.

on the day next succeeding the day when this agreement terminates shall be deemed to be a year.

ARTICLE II

Dedication

Section 1. On or before December 31, 1960, Gatherer shall dedicate to the performance of this agreement natural gas reserves in the Texas Gulf Coast area having an aggregate initial volume equal to or exceeding four hundred (400) billion cubic feet. Dedication of a reserve of natural gas to the performance of this agreement shall occur when Gatherer shall submit to El Paso in writing (a) an accurate description of such natural gas reserve, (b) copies of the contract or other instrument evidencing Gatherer's prior right to withdraw the gas in such reserve and sell and deliver the same to El paso under this agreement, and (c) a statement executed by Gatherer to the effect that such reserve is dedicated to the performance of this agreement. The aggregate initial volume of the dedicated reserves shall be deter-

mined and redetermined from time to time, as provided in Article XIV of this agreement. If the initial determination of the aggregate initial volume of the dedicated reserves shall disclose that such volume is less than four hundred (400) billion cubic feet, Gatherer shall forthwith obtain and dedicate to the performance of this agreement such additional quantity of gas reserves as may be necessary to cause the aggregate initial volume of the dedicated reserves to equal or exceed four hundred (400) billion cubic feet. If, however, after the initial determination any redetermination of the aggregate initial volume of the dedicated reserves shall disclose that such volume is less than four hundred (400) billion cubic feet, Gatherer

shall be obligated only to exercise its best efforts to obtain without economic loss and under reasonable terms and conditions and dedicate to the performance of this agreement such additional quantity of gas reserves as may be necessary to cause the aggregate initial volume of the dedicated reserves to equal or exceed four hundred (400) billion cubic feet.

Section 2. Withdrawals of gas from the dedicated reserves during any month must not exceed deliveries made by Gatherer to El Paso during such month under the provisions of this agreement. By written agreement between Gatherer and El Paso dedicated reserves may be released from this agreement if other gas reserves satisfactory to El Paso are substituted in lieu thereof, in which case such other gas reserves shall become dedicated reserves hereunder.

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ARTICLE III

Governmental Authority

Section 1. El Paso and Gatherer shall, as soon as possible and in any event not later than June 1, 1960, make such applications and filings to and with the Federal Power Commission as may be required on the part of each such respective party in order to procure such Certificate of Public Convenience and Necessity as is necessary for the construction, ownership and operation by such party of the facilities necessary for it to effect delivery or receipt of gas hereunder or otherwise necessary for such party to perform its obligations under this agreement. Each party making such application shall prosecute the same with diligence to final disposition by the Federal Power Commission and shall promptly notify the other party in writing of the final action taken thereon by the Federal Power Commission.

Section 2. If any Certificate of Public Convenience and Necessity referred to in Section 1 of this article shall be denied, this agreement shall thereupon terminate, and neither party hereto shall thereafter have any liability under this agreement to the other.

Section 3. If any Certificate of Public Convenience and Necessity referred to in Section 1 of this article shall be issued in form and substance unreasonably burdensome to the party receiving the same, such party shall have the right, at its option, to cancel this agreement by giving the other party written notice of such cancellation within thirty (30) days after the final order

issuing such certificate. In case any such notice is given, this agreement shall terminate upon the giving of such notice, and neither party shall thereafter have any liability under this agreement to the other. Acceptance by either party of emergency or temporary Certificates of Public Convenience and Necessity, even though the party accepting the same shall act thereunder, shall not, within the meaning of this article, constitute receipt of a Certificate of Public Convenience and Necessity in form and substance satisfactory to such party unless such party shall notify the other party in writing that it waives all objections to the form or nature of the same.

Section 4. When the Certificates of Public Convenience and Necessity contemplated in this article have been issued and accepted by the respective parties receiving the same, each of such parties shall promptly commence, and thereafter prosecute to completion, the design, acquisition of materials and rights-of-way for and construction of the facilities necessary for it to perform its obligations under this agreement.

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ARTICLE IV

Quantity

Section 1. Commencing as of the earlier of:

(a) The date of completion of all of the facilities referred to in Section 4 of Article III of this agreement, or

(b) July 1, 1961, or such later date as Gatherer shall complete its said facilities and stand ready to deliver gas to El Paso under this agreement,

Gatherer shall sell and deliver to El Paso from the dedicated

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reserves, and El Paso shall receive from Gatherer from the dedicated reserves and pay for, or pay for whether or not received, during each year, subject to the provisions of Section 2 of this Article IV, a minimum quantity of natural gas per day determined as provided in Article XIV of this agreement. Such minimum quantity shall be averaged over each year. In addition, El Paso shall have the right to purchase and receive from Gatherer such additional quantity of gas from the dedicated reserves as El Paso may desire, and Gatherer shall sell and deliver the same to El Paso; provided, however, that Gatherer shall not be obligated during any day to sell and deliver to El Paso under the terms of this agreement more than one hundred thirty-three per cent (133%) of the minimum daily quantity of gas as last determined pursuant to the provisions of Article XIV of this agreement.

Section 2. Should El Paso fail to purchase and receive from Gatherer during any year the minimum quantity of gas which El Paso was required to purchase and receive from Gatherer during such year pursuant to the provi-

sions of this Article IV, which failure was not due to physical nonavailability of gas, causes within the control of Gatherer, regulation by governmental authority or force majeure intervention, then within thirty (30) days after the end of such year El Paso shall pay Gatherer for that quantity of gas (called "unreceived quantity" in this section) which represents the difference between the minimum quantity of gas which El Paso was required hereunder to purchase and receive from Gatherer during such year and the quantity of gas actually

purchased and received by El Paso from Gatherer hereunder during such year. Payment shall be made at the weighted average price paid by El Paso hereunder for gas during such year. If in any year El Paso fails to purchase and receive from Gatherer during such year the minimum quantity of gas which El Paso was required to purchase and receive from Gatherer during such year pursuant to the provisions of this Article IV, El Paso shall have the right at any time during the next four (4) succeeding years to take and receive the quantity of gas (called "make-up gas" in this section) which it paid for but did not receive during the year when such deficiency occurred; provided, however, that (a) the quantity of gas so taken by El Paso shall not be treated as a part of the minimum quantity of gas which El Paso is obligated to purchase and receive hereunder during any of such succeeding years, and (b) the provisions of this section shall not operate to increase the maximum daily quantity of gas which Gatherer is obligated to deliver to El Paso hereunder, and (c) the provisions of this section shall not operate to extend the term of this agreement. El Paso shall not be required to pay Gatherer for make-up gas unless at the time such make-up gas is received

the price in effect under this agreement is higher than the price paid by El Paso for the corresponding unreceived gas, in which case El Paso shall pay Gatherer for the make-up gas a price per one thousand (1,000) cubic feet equal to the difference between the price per one thousand (1,000) cubic feet then in effect under this agreement and the price per one thousand (1,000) cubic feet paid for the unreceived gas.

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Section 3. In the event that on any day the deliveries of gas by Gatherer to El Paso hereunder are, (1) by reason of phyical nonavailability of gas, (2) causes within the control of Gatherer, (3) regulation by governmental authority or (4) force majeure intervention, less than one hundred thirty-three per cent (133%) of the minimum daily quantity then in effect hereunder, then in determining for the purposes of Section 2 of this article the average daily volume of gas taken by El Paso hereunder during the year in which such day occurs, there shall be taken, in lieu of the volume of gas (if any) actually delivered by Gatherer to El Paso during such day, a volume of gas equal to one hundred thirty-three per cent (133%) of the minimum daily quantity then in effect hereunder, or the quantity of gas El Paso desired to take, whichever is the lesser.

Section 4. In addition to the quantities herein provided, in the event Gatherer from time to time has excess gas available, Gatherer may, upon its option, offer to sell and deliver such gas to El Paso and El Paso, upon its option, may receive such excess gas and same shall be deemed delivered under this contract and shall be paid for at the applicable price as provided in Article X.

ARTICLE V

Quality

All gas delivered by Gatherer to El Paso under the terms of this agreement shall be natural gas and shall conform to the following specifications (determination as to conformity of the gas with these specifications shall be made in accordance with the generally accepted procedures of the industry):

(a) *Liquids:* The gas shall be free from hydrocarbons and water in liquid form at the temperature and pressure at which delivered.

(b) *Hydrogen Sulphide:* The gas shall not contain more than one (1) grain of hydrogen sulphide per one hundred (100) cubic feet.

(c) *Organic Sulphur:* The gas shall not contain more than twenty (20) grains of organic sulphur (mercaptans) per one hundred (100) cubic feet.

(d) *Carbon Dioxide:* The gas shall not have a carbon dioxide content in excess of two per cent (2%) by volume.

(e) *Dust, Gums, etc.:* The gas shall be commercially free of dust, gums and other solid matter.

(f) *Heating Value:* The total gross heating value of the gas delivered hereunder shall not be less than one thousand (1,000) British thermal units per cubic foot.

ARTICLE VI

Delivery Point and Pressure

Section 1. The point of delivery for all gas to be sold and delivered hereunder shall be a point in the immediate vicinity of Three Rivers, Texas, to be selected by agree-

ment between El Paso and Gatherer, and such other point or points as may be mutually agreed on by the parties hereto.

Section 2. Title to and ownership of the gas delivered hereunder shall pass to and vest in El Paso at the point of delivery. Gatherer shall be solely liable and responsible for said gas prior to the time of delivery thereof to El Paso, and El Paso shall be solely liable and responsible therefor thereafter.

Section 3. Gatherer shall deliver the gas to El Paso at the delivery point at such varying pressures as El Paso may require; provided, however, that Gatherer shall not be obligated to deliver the gas at a pressure in excess of five hundred fifty

pounds (550#) per square inch gauge.

ARTICLE VII

Meters

Section 1. El Paso, at its sole cost and expense, shall install, maintain and operate at the delivery point a standard type orifice meter or meters for the measuring of the quantity of gas delivered hereunder. Orifice meters shall be installed and operated in accordance with the specifications prescribed in Gas Measurement Committee Report No. 3, dated April, 1955, of the Natural Gas Department of the American Gas Association. El Paso shall cause the charts on such meters to be changed each day. The respective meter, meter readings and meter charts shall be accessible at all reasonable times to inspection and examination by Gatherer.

Section 2. From time to time and at least once in each three (3) months, the accuracy of El Paso's measuring equipment shall be verified by and at the expense of El

Paso. If either party at any time shall notify the other that it desires a special test of any meter, the other party shall cooperate to secure and immediate vertification of the accuracy of such meter and joint observation of any adjustments. If any such test shall be requested by Gatherer, and upon such test, the measuring equipment shall be found to be registering correctly, the cost of such test shall be charged to Gatherer, otherwise the cost of all such tests shall be borne by El Paso. El Paso shall give notice to Gatherer of the time of all tests in order that Gatherer may

conveniently have its representative present. Reading, calibration and adjustment of El Paso's meters and changing of charts shall be done only by El Paso.

Section 3. If, upon any test, the percentage of inaccuracy shall be two per cent (2%) or more, the registration of such meter shall be corrected at the rate of such inaccuracy for any period which is definitely known or agreed upon, but in case the period is not definitely known or agreed upon, then for a period extending back one-half (½) of the time elapsed since the date of the last calibration. Following any test, metering equipment found inaccurate shall be immediately restored by El Paso as closely as possible to a condition of accuracy. If, for any reason, any meter is out of service or out of repair so that the amount of gas delivered cannot be estimated or computed from the reading thereof, the amount of gas delivered through the period such meter is out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available using the first of the following methods which is feasible:

a. By correcting the error if the percentage of error is ascertainable by calibration test or mathematical calculation.

b. By using the registration of Gatherer's check meter if installed and accurately registering.

c. By estimating the quantity of deliveries by deliveries during preceding periods under similar conditions when the meter was registering accurately.

Section 4. Gatherer may, at its option and expense, install

and operate a check meter to check El Paso's meter, but measurement of gas for the purpose of this agreement shall be by El Paso's meter, except as hereinabove specifically provided to the contrary. Such check meter and equipment shall be so installed as not to interfere with the operation of the meter or meters to be installed and maintained by El Paso at or near the point of delivery, as provided for in Section 1 of this Article VII.

Article VIII

Unit of Volume

Section 1. The unit of volume for all purposes hereunder (except for computation of "quality" values under the provisions of Article V) shall be one (1) cubic foot at an absolute pressure of fourteen and sixty-five hundredths pounds (14.65#) per square inch at a temperature of sixty (60) degrees Fahrenheit.

Section 2. The unit of volume for the determination of heating value under subparagraph (f) of Article V hereof shall be the amount of gas, saturated with water vapor, which would occupy a volume of one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under a pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

Section 3. The unit of volume for determination of quality values under subparagraphs (b) and (c) of Article V hereof shall be one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under a pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

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Article IX

Measurement

Section 1. All measurement of gas hereunder shall be in accordance with the recommendations for measuring gas contained in Report No. 3 of the Gas Measurement Committee of the American Gas Association, dated April, 1955, applied in a practical and appropriate manner, and correction shall be made for deviation from Boyle's Law.

Section 2. The temperature of the gas flowing through the meter or meters to be installed and maintained by El Paso at the delivery point or points shall be determined by the use of a recording thermometer of standard manufacture installed by El Paso so that it may properly record such temperature. The arithmetical average of the twenty-four (24) hour record, or of that portion of the twenty-four (24) hours during which gas was passing, if gas had not been passing during the entire period, from the recording thermometer shall be taken to be the gas temperature for the day and shall be used to make proper corrections in volume computations.

Section 3. The specific gravity of the gas delivered hereunder shall be determined by the use of a recording gravitometer to be installed, maintained and operated by El Paso at each delivery point. The arithmetical average of the hourly specific gravity during each twenty-four (24) hour period, or during that period which gas was actually passing, shall be used to make proper computations.

Section 4. The gross heating value of the gas shall be determined by El Paso at intervals of three (3) months or by means of a recording calorimeter of the Thomas type, at the option of El Paso.

ARTICLE X

Price

Section 1. The price to be paid by El Paso to Gatherer per one thousand (1,000) cubic feet for all natural gas sold hereunder shall be as follows:

(a) For the four (4) year period commencing on the date specified in Section 1 of Article IV of this agreement, twenty-two cents (22¢).

(b) For the next four (4) year period, twenty-three cents (23¢).

(c) For the next four (4) year period, twenty-four cents (24¢).

(d) For the next four (4) year period, twenty-five cents (25¢).

(e) For the next four (4) year period, twenty-six cents (26¢).

Section 2. It is recognized that the prices provided for in this contract are presently subject to Federal Power Commission regulation. In the event the Commission shall at any time order a reduction in the contract prices herein, then El Paso agrees that Gatherer may subsequently, at its option, file for such higher price as Gatherer may feel is justified, providing for

but not exceeding the revenues to which Gatherer is entitled as provided in this Article X hereof. Gatherer may file for

any such price sufficiently in advance of the date of any contract price increase to make up for any prior lag in collecting the contract price.

ARTICLE XI

Billing and Payment

Section 1. On or before the tenth (10th) day of each calendar month, El Paso shall render to Gatherer a statement showing the amount of gas purchased by El Paso hereunder during the preceding calendar month, and payment for such gas shall be made by El Paso to Gatherer on or before the twenty-fifth (25th) day of the calendar month in which such statement is rendered. Any errors in such statement or payment shall be promptly reported to El Paso, and El Paso shall make proper adjustment thereof within thirty (30) days after final determination of the correct volume or values involved; provided, however, that if no such errors are reported to El Paso within one (1) year from the date such statement or payment was submitted to Gatherer the same shall be conclusively deemed to be correct.

Section 2. Upon request, El Paso shall furnish Gatherer the measurement charts applicable to any monthly statement. Gatherer shall return to El Paso all such charts within thirty (30) days after receipt, and Gatherer shall have access to El Paso's records and books at all reasonable hours so far as they pertain to the gas sold hereunder.

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ARTICLE XII

Taxes

Section 1. Subject to the other provisions of this article, Gatherer shall pay or cause to be paid all taxes and assessments imposed on Gatherer with respect to the gas de-

livered hereunder prior to its delivery to El Paso, and El Paso shall pay or cause to be paid all taxes and assessments imposed upon El Paso with respect to the gas delivered hereunder after its receipt by El Paso. Neither party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this agreement.

Section 2. Any sales, transaction, occupation, service, production, severance, gathering, transmission, export or excise tax, assessment or fee levied, assessed or fixed by the United States, the State of Texas, or other governmental authority and taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise or general property taxes) in respect of or applicable to the gas delivered hereunder to El Paso in addition to or greater than those, if any, being levied, assessed or fixed on the date of this agreement in respect of or applicable to such gas and which Gatherer may be liable for, either directly or indirectly, or through any obligation to reimburse others, are hereinafter collectively referred to as an "additional tax"; provided, however, that all existing taxes, up to the present respective rates thereof, now

imposed on the parties hereto shall not be considered as an additional tax. It is expressly understood and agreed between the parties hereto that El Paso shall, subject to the conditions hereinafter set forth, pay to Gatherer three-fourths (¾ths) of any such additional tax. Should Gatherer so become liable for any such additional tax, Gatherer shall notify El Paso immediately. Within ninety (90) days after the end of each calendar month, Gatherer shall prepare and submit to El Paso a statement setting

fourth the amount of any such additional tax that Gatherer has paid during such calendar month, and within thirty (30) days after submission of such statement, adjustment between the parties hereto shall be made by El Paso reimbursing Gatherer to the extent of three-fourths (¾ths) of the amount of any such additional tax which Gatherer shall have so paid. The tax reimbursement herein provided for shall apply to the total amount of money Gatherer is required to pay by virtue of any such additional tax but shall not apply to any delinquent interest or penalty payments that may be applicable to any such additional tax. Taxes applicable to any royalty, overriding royalty, production payment or similar interest shall be considered to be covered by the provisions of this Section 2 only if the reimbursement made by El Paso to Gatherer with respect thereto is passed on by Gatherer to the owner of such royalty, overriding royalty, production payment or similar interest.

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ARTICLE XIII

Term

Subject to the other provisions of this agreement, this agreement shall be effective from the date hereof and shall continue in force for a term of twenty (20) years from the date specified in Section 1 of Article IV of this agreement.

ARTICLE XIV

Gas Reserves

Section 1. As soon as may be reasonably practical El Paso and Gatherer shall conduct a joint study of the dedicated reserves to determine the quantity of recoverable gas contained therein. Upon demand of either party a similar study shall be conducted from time to time there-

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after but not more often than once each two (2) years. Each such study shall give proper consideration to development, operating conditions, producing conditions, applicable orders, rules and regulations of regulatory authorities, and other relevant factors and shall determine as nearly as can be determined the quantity of gas then remaining on the date of such study which can thereafter be produced for delivery to El Paso under the provisions of this agreement. To the quantities so determined by the last such study shall be added the quantity of gas theretofore delivered to El Paso under this agreement. The quantity of gas arrived at by such addition is called the "aggregate initial volume" of the dedicated reserves in this article and in Article II of this agreement. For all purposes the volume of recoverable gas in the dedicated reserves

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shall be determined by calculations based on a terminal bottom hole pressure of five hundred pounds (500±) per square inch absolute or such lower pressure as El Paso and Gatherer may agree upon at the time of each dedication.

Section 2. The number of billions of cubic feet of gas found by the last reserve study to constitute the aggregate initial volume of the dedicated reserves shall be divided by eight (8) and the quotient so obtained shall be multiplied by one million (1,000,000). The product of such multiplication shall be the number of cubic feet of gas which shall be the minimum daily quantity of gas, averaged over each year, which El Paso shall be obligated to purchase under the provisions of this agreement; provided, however, that such minimum daily quantity shall not exceed fifty million (50,000,000) cubic feet of gas; and, provided further, that if the aggregate initial volume of the dedicated reserves

shall ever exceed four hundred (400) billion cubic feet, Gatherer shall have the right to deliver the excess over four hundred (400) billion cubic feet to others, subject to the conditions that: (a) such deliveries shall not interfere in any way with deliveries of gas to El Paso under this agreement and (b) the quantity of gas which can be so delivered to others shall be redetermined, and may be increased or decreased, at the time of each subsequent reserve study.

Section 3. If El Paso and Gatherer shall disagree as to any fact or facts to be determined by any joint study mentioned in this article the same shall be determined by arbitration in the following manner:

El Paso shall appoint one competent geologist or reservoir engineer and Gatherer shall appoint one competent geologist or

reservoir engineer and the two so appointed shall select a third competent geologist or reservoir engineer. If either El Paso or Gatherer shall fail to appoint a geologist or reservoir engineer within ten (10) days after a request for such appointment is made by the other party in writing, or if the two geologists or reservoir engineers so appointed shall fail within ten (10) days after the appointment of the second of them to agree on a third geologist or reservoir engineer, the geologist or reservoir engineer necessary to complete a board of three geologists or reservoir engineers shall be appointed upon application by either party therefor by the United States District Judge, senior in point of service, of a Federal Judicial District in which some part of the property covered by this agreement is situated. In the event such judge shall fail or refuse to act, then either party hereto may request the American Arbitration Association to select the geologist or reservoir engineer to com-

plete the board of three. After three geologists or reservoir engineers are appointed pursuant to the foregoing provisions of this article they shall meet, hear the parties with respect to the matter of said fact or facts, and arrive at a determination of said fact or facts. Any determination agreed to in writing by at least two of said geologists or reservoir engineers shall be final and binding on the parties hereto. All geologists or reservoir engineers appointed pursuant to this article shall be individuals experienced in the oil and gas industry and competent to pass on the matter of said fact or facts. The fees and expenses of the geologists or reservoir engineers shall be borne equally by the parties hereto.

Section 4. Gatherer shall, from time to time, at El Paso's

request, furnish to El Paso such geological, engineering and production data as may be available to Gatherer and as may be desired by El Paso for a study of the dedicated reserves and the deliverability thereof and which will enable El Paso to make and maintain currently its own reserve and deliverability studies.

ARTICLE XV

Title

Gatherer hereby warrants title to the gas sold by it hereunder and its right to sell the same and warrants that all such gas is owned by Gatherer free from all liens, encumbrances and adverse claims, including, but not limited to liens to secure payment of production taxes, severance taxes and other taxes. As between El Paso and Gatherer, Gatherer shall at all times have the obligation to make settlement for all royalties, overriding royalties and other payments due to the owners of the mineral, royalty and

other interests under the properties from which such gas is produced, as modified by such assignments, unitization agreements and other documents as may appear of record or otherwise be binding upon Gatherer or its predecessors in title, and to make settlements with all other persons having any interest in the gas (or the proceeds of the sale thereof) sold by Gatherer hereunder. Gatherer shall save and hold El Paso free and harmless from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any and all persons to the gas sold by it hereunder or to royalties, overriding royalties, or other payments with respect thereto, or to taxes, licenses, fees or charges thereon which are applicable before the title to the gas passes to El Paso or which may be levied and assessed upon the sale thereof to El Paso, subject, however, to the other provisions of this agreement.

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ARTICLE XVI

Force Majeure

Section 1. Except for El Paso's obligations to make payment for gas delivered hereunder, neither party hereto shall be liable for any failure to perform the terms of this agreement when such failure is due to "force majeure" as hereinafter defined. The term "force majeure" as employed in this agreement shall mean acts of God, strikes, lockouts or industrial disputes or disturbances, civil disturbances, arrests and restraint from rulers or people, interruptions by government or court orders, present and future valid orders of any regulatory body having proper jurisdiction, acts of the public enemy, wars, riots, blockades, insurrections, inability to secure labor or inability to secure materials, including inability to secure materials by reason of allocations promulgated by authorized governmental agencies, epidemics, landslides, lighting, earth-

quakes, fire, storm, floods, washouts, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or pipe lines, inability to obtain easements or rights-of-way, the making of repairs or alterations to pipe lines or plant, or any other cause, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming "force majeure". Upon the occurrence of an event constituting "force majeure", the same shall, so far as possible, be remedied with all reasonable dispatch. The settlement of strikes or lockouts or industrial disputes or disturbances shall be entirely within the discretion of the

party having the difficulty, and the above requirement that any "force majeure" shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or industrial disputes or disturbances by acceding to the demands of any opposing party therein when such course is inadvisable in the discretion of the party having the difficulty.

Section 2. It is understood that either party may, without liability to the other party, interrupt the operations of its plants or pipe line system for the purpose of making necessary alterations or repairs thereto, but that such interruptions shall be for only such time as may be reasonable. The party interrupting operations shall give the other party reasonable notice, except in case of emergency, of its intentions so to interrupt operations and of the estimated time during which no gas will be taken or delivered, as the case may be.

Article XVII

Rules and Regulations

This agreement is subject to all present and future valid laws and valid orders, rules and regulations of the United

States, the State of Texas, or any duly constituted agency thereof.

ARTICLE XVIII

Notices

All notices, statements and other communications required or permitted to be given hereunder shall be in writing and shall be deemed to have been effectively given when mailed by United States mail, postage prepaid and registered, addressed to Gatherer

at Petroleum Tower, Corpus Christi, Texas, or to El Paso at P. O. Box 1492, El Paso, Texas, as the case may be, or to such other address as either party shall respectively hereafter designate in writing.

Notices of change of address of any of the parties shall be given in writing to the others in the manner aforesaid and shall be observed in the giving of all future notices, statements or other communications required or permitted to be given hereunder.

ARTICLE XIX

Successors and Assigns

This agreement shall bind and benefit the parties hereto and their respective successors and assigns, provided that no conveyance or transfer of any interest of either party shall be binding upon the other party until such other party has been furnished with written notice and true copy of such conveyance or transfer; provided, further, that either El Paso or Gatherer, or both, may assign its right, title and interest in, to and by virtue of this agreement, including any and all extensions, renewals, amendments and supplements thereto, to a trustee or trustees, individual or

corporate, as security for bonds or other obligations or securities, without such trustee or trustees assuming or becoming in any respect obligated to perform any of the obligations of the assignor, and if any such trustee be a corporation, without its being required by the parties hereto to qualify to do business in the State of Texas.

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ARTICLE XX

Additional Sales

The parties hereto contemplate that El Paso shall have the right, at its option, but shall not be obligated, to purchase additional gas from Gatherer and that Gatherer, if El Paso shall exercise such option, shall sell and deliver additional gas to El Paso at a price and upon terms to be hereafter determined by mutual agreement, depending upon the availability of additional gas in Gatherer's pipe line system, the need of gas from Texas Gulf Coast sources by El Paso and all other pertinent factors.

ARTICLE XXI

Topical Headings

The topical headings used herein are inserted for convenience only and shall not be construed as having any substantive significance or meaning whatsoever or as indicating that all of the provisions of this agreement relating to any particular topic are to be found in any particular article.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed in duplicate originals, on this the day and year first above written.

"BUYER"
EL PASO NATURAL GAS COMPANY
By D. H. TUCKER
D. H. TUCKER—*Vice President*

"SELLER"
LO-VACA GATHERING CO.
By JACK WARE
Vice President

ATTEST:
M. PLUMMER
Assistant Secretary

ATTEST:
M. J. ARNOLD
Asst. Secretary

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Exhibit B-3

List of contracts dedicated to sale to El Paso Natural Gas Company.

875

GAS DEDICATED BY LO-VACA GATHERING COMPANY TO EL PASO NATURAL GAS COMPANY

Date of Contract	Contract Number	Seller	Name and Location of Field or Area
3/29/60	5220-A	Phillips Petroleum Company, *et al.*	Fashing Field Area, Atascosa County, Texas
4/12/60	5220-B	Miller & Fox	Tulsita-Wilcox (North Pettus) Area in Bee, Goliad and Karnes Counties, Texas
3/ 1/60	5220-LO	Melba Production Company, Operator	Mt. Lucas Area, Live Oak County, Texas
3/ 1/60	5220-CA	Tex-Star Oil & Gas Corp., *et al.*	Magnolia Beach Field, Calhoun County, Texas
4/13/60	5221-CA	Tex-Star Oil & Gas Corp., *et al.*	Magnolia Beach Field, Calhoun County, Texas
4/13/60	5222-CA	Tex-Star Oil & Gas Corp., *et al.*	Magnolia Beach Field, Calhoun County, Texas

(876)

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Exhibit C

CONTRACT SUMMARIES

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SUMMARY OF CONTRACT DATED MARCH 15, 1960

1. Name of seller:	Lo-Vaca Gathering Co.
2. Name of purchaser:	El Paso Natural Gas Company.
3. Location of sale:	Live Oak County, Texas.
4. Date of Contract:	March 15, 1960.
5. Initial price per Mcf:	22¢
6. Measurement pressure base: (psia)	14.65
7. Type of escalation provision:	Periodic: one cent per Mcf after every four-year period.
8. Hydrocarbon liquids included:	None
9. Other price adjustments:	Buyer to reimburse seller for three-fourths of any increase in tax after date of contract.
10. Estimated daily volumes:	50,000,000 cubic feet.
11. Delivery pressure:	550 pounds psig.
12. Delivery point:	At termination of gathering system at a point to be agreed upon near Three Rivers, Live Oak County, Texas.

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SUMMARY OF CONTRACT DATED MAY 16, 1960

1. Name of seller:	Lo-Vaca Gathering Co.
2. Name of purchaser:	El Paso Natural Gas Company.
3. Location of sale:	Live Oak County, Texas.
4. Date of Contract:	May 16, 1960.
5. Initial price per Mcf:	22¢
6. Measurement pressure base: (psia)	14.65
7. Type of escalation provision:	Periodic: one cent per Mcf after every four-year period.
8. Hydrocarbon liquids included:	None
9. Other price adjustments:	Buyer to reimburse seller for three-fourths of any increase in tax after date of contract.
10. Estimated daily volumes:	50,000,000 cubic feet.
11. Delivery pressure:	550 pounds psig.
12. Delivery point:	At termination of gathering system at a point to be agreed upon near Three Rivers, Live Oak County, Texas.

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AFFIDAVIT

DISTRICT OF COLUMBIA) ss:

Bradford Ross, being first duly sworn, deposes and says that he is the attorney for Lo-Vaca Gathering Co.; that he has read the foregoing "Application for Certificate of Public Convenience and Necessity"; that the statements therein contained are true to the best of his knowledge, information and belief; and that he is authorized to file the same with the Federal Power Commission.

/s/ BRADFORD ROSS
Bradford Ross

Subscribed and sworn to before me by the said Bradford Ross, this 1st day of June, 1960.

/s/ DEBRA DINGWALL
Notary Public

(SEAL)

My Commission expires June 14, 1964.

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[CERTIFICATE OF SERVICE]

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP61-177

In the Matter of
HOUSTON PIPE LINE COMPANY

Petition of Houston Pipe Line Company for a Declaratory Order to Remove Uncertainty.

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COMES NOW Houston Pipe Line Company (hereinafter called "Houston") pursuant to the provisions of Section

1.7(c) of the Rules of Practice and Procedure of the Federal Power Commission (hereinafter called "Commission") and petitions the Commission for a declaratory order to remove uncertainty as to the jurisdiction of the Commission under the Natural Gas Act over the proposed sale hereinafter described and for a declaration of the Commission that it has no jurisdiction under the Natural Gas Act over such sale because it will be wholly in intrastate commerce. In support of this motion Houston respectfully states as follows:

I.

Houston is a Texas corporation having its principal offices in the Petroleum Building, Houston, Texas. Since 1925 Houston has been, and presently is, engaged in the

intrastate purchase, transportation and sale of natural gas within the State of Texas only. Houston currently delivers an average of approximately 500,000,000 cubic feet of gas daily to its present customers. The gas which it purchases and transports is sold by it either to distributing companies for resale by them for ultimate consumption in Texas communities or to industrial and commercial consumers located in the Texas Gulf Coast area. Houston presently has available for sale substantial volumes of pipeline-quality natural gas which it proposes to sell to El Paso Natural Gas Company (hereinafter called El Paso Natural").

II.

By force of covenants in virtually all of its gas supply contracts, Houston is prohibited, except by consent of the sellers of gas to it, from introducing into interstate commerce any of the gas which it purchases. Virtually all

contracts pursuant to which Houston purchases gas contain the following provision, or a provision of like tenor and effect:

"XVII. Sales by Buyer in Interstate Commerce.

"17.1 Buyer [Houston] represents that Buyer has no present desire or intention that the gas delivered to Buyer by Seller hereunder be transported in interstate commerce or sold for resale in interstate commerce. If because of changed conditions which Buyer cannot now foresee, Buyer should desire to transport or sell gas delivered hereunder into interstate commerce, Buyer shall

give Seller not less than sixty (60) days' prior written notice of its intention to sell or deliver any gas purchased hereunder for transportation, sale or resale in interstate commerce, as such term is defined in the Natural Gas Act (June 21, 1938, c. 556, Sec. 24, 52 Stat. 833, Ch. 1513, Title 15, U.S.C.A.), as heretofore or hereafter amended, or in substitute legislation covering the same or similar subject matter, and notwithstanding any other provision hereof, Seller shall have and is hereby given the continuing right and option to cancel and terminate this contract at any time during the period of fifty-five (55) days next following the receipt by Seller of any such notice from Buyer by the giving of written notice of such cancellation and termination to Buyer within such period of time, but not thereafter. The failure of Seller to cancel and terminate this contract according to the provisions of this Article XVII within such period after receipt of any such notice from Buyer shall be conclusively presumed to be an election by Seller not to cancel and terminate this contract and Seller shall thereafter be obligated to

cooperate with Buyer in making the certificate applications, rate filings, and other filings in accordance with the said Natural Gas Act, as heretofore or hereafter amended, or as required in substitute legislation covering the same or similar subject matter."

In the light of such representations and contractual obligations Houston cannot make gas available to El Paso Natural from its existing system and gas supply if the gas is moved or sold in interstate commerce. Any attempt by Houston to obtain consent from its producers for sale in interstate commerce from existing gas reserves would require renegotiation with such producers which would most certainly raise the cost of gas to Houston and hence to El Paso Natural.

III.

El Paso Natural and Houston, on July 19, 1960, entered into a contract (hereinafter called the "Contract") for the intrastate sale of gas by Houston to El Paso Natural of up to 77,000,000 cubic feet per day of fuel gas to be delivered by Houston at a point near Three Rivers, Live Oak County, Texas.[1] This gas is desired by El Paso Natural to increase its available reserves.

A principal reason for the desire of El Paso Natural to obtain gas already gathered by Houston is that the price to El Paso Natural under the proposed arrangement is tied to Houston's weighted average field cost of gas, which is a lesser cost than could be expected by El Paso Natural if El Paso Natural had to build its own gathering system and buy from producers under new sales agreements.

[1] A copy of the Contract is contained in El Paso Natural's original application for a certificate of public convenience and necessity in Docket No. CP 61-26, Exhibit "H", and is incorporated herein by reference.

Because of the rights of cancellation of its producers, as heretofore described, Houston's obligations under the Contract are conditioned upon a holding by the Commission that neither Houston nor any of its producers would become "natural gas companies" under the Natural Gas Act by virtue of the consummation of the transaction with El Paso Natural.

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For these reasons Houston petitions the Commission for a declaration that the proposed transaction (described in detail later herein) with El Paso Natural will not subject Houston or its producers to the jurisdiction of this Commission.

IV.

The Contract requires that all the gas purchased from Houston be used and consumed by El Paso Natural solely as fuel in the operation of El Paso Natural's fuel consuming facilities in Texas and as fuel in the gasoline plant of Phillips Petroleum Company in Ector County, Texas (Contract Article II). It is contemplated that both at the point of delivery (Three Rivers, Texas) of this gas to El Paso Natural and downstream therefrom the gas will be commingled with other Texas-produced gas sold to El Paso Natural and at least some of this other gas will have been sold to El Paso Natural for resale for ultimate public consumption outside of Texas.[2]

[2] El Paso Gas Supply Company, believed to be a wholly owned subsidiary of El Paso Natural, has agreed with El Paso Natural to transport this common stream of gas from this delivery point near Three Rivers, Texas to El Paso Natural's Sonora plant in Sutton County, Texas where the gas will be taken into El Paso Natural's system. The transportation agreement between El Paso Natural and El Paso Gas Supply Company is contained in El Paso Gas Supply Company's original application for a certificate of public convenience and necessity in Docket No. CP 60-101, Exhibit "P", in which original application El Paso Gas Supply Company has requested authorization to commence services and construct the facilities necessary to render this transportation service.

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There are attached hereto as Exhibits "A" and "B" flow diagrams prepared by El Paso Natural's engineering staff showing the locations of the various fuel consuming facilities located within the State of Texas at which the gas sold by Houston to El Paso Natural will be consumed and the routes which will be traveled to those points. In addition, tables appear on the faces of the diagrams showing the average and maximum daily consumption of gas, respectively, at such facilities as have been constructed and operated in the past and an estimate of the anticipated average and maximum daily fuel requirements, respectively, at those facilities which are not yet in operation. Houston is informed that these diagrams will appear in a supplement to El Paso Natural's Original Application in Docket No. CP 61-26.

In the Contract (Article II) El Paso Natural has covenanted that all compressors and other installations consuming gas sold under the Contract shall physically be located on its system of pipelines and laterals within the State of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the originating delivery point. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into compressor stations or other fuel consuming facilities located in Texas which

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shall in the aggregate consume a volume of gas equal to or greater than the volume of gas contributed into the commingled stream at the delivery point by Houston. El Paso Natural has covenanted (Contract Article II) to retain for a period of years and to supply on demand meter reading charts taken from meters located on such system

to assure proof at all times of the foregoing described continuous flow and consumption of the gas.

All of the gas with which Houston's gas will be commingled by the time it reaches the points of consumption in Texas will have been produced in Texas. A volume of gas equal to or in excess of the volume of gas delivered by Houston to El Paso Natural will either be consumed by El Paso Natural in its gas fuel consuming facilities within the State of Texas, or will be delivered by El Paso Natural to Phillips Petroleum Company at the latter's gasoline plant (Contract Article II).

El Paso Natural proposes to construct three new "field fuel pipelines" in order that three facilities will receive their entire fuel gas supply from the common stream into which Houston will deliver gas.[3] The other existing

and proposed components of El Paso Natural's plant within Texas which will consume fuel gas from the common stream already receive their supplies of fuel gas from the main transmission lines which will be carrying the common stream to which Houston will have contributed. Phillips' gasoline plant has previously met all of its fuel gas requirements with gas that has been produced in Texas which has been delivered to it by El Paso Natural.

None of the producers who have previously sold gas to El Paso Natural will be replaced by the proposed transaction as El Paso Natural will continue to buy from them.

V.

There would be no question but that Houston's purchase from its producers and its proposed transportation and sale

[3] Paragraph IV.D. of El Paso Natural's original application for a certificate of public convenience and necessity in Docket No. CP 61-26.

of gas would not be jurisdictional if the subject gas were to be transported in a separate pipeline between the identical points of delivery and consumption within the State.[4] The requisite character of *interstate commerce* would be lacking because the gas would not go "between any point in a state and any point outside thereof, or between points within the same state but through any place outside

thereof . . ."[5] In addition, with respect to the sale by Houston, there would be no "*sale . . . for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use" of any of the gas other than that small portion to be delivered by El Paso Natural to Phillips.[6] The proposed sale differs only in the respect that the gas will move in a commingled stream. However, the identical volume of commingled gas will be separated from the remainder of the commingled stream and required by contract to be used within the state of origin and will thus retain its intrastate character. If the gas to be sold by Houston were sold without any restrictions on its use, then the entire sale would probably be subject to the jurisdiction of the Commission as being a sale in interstate commerce even though part of the gas would not pass beyond the boundaries of the state.[7] However, the authorities are clear that where the gas is required to be taken from the commingled stream, the Commission has no jurisdiction over the gas sold under such conditions.

No clearer statement of Houston's position could be made than that of the Examiner in the controlling analogous

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[4] See e.g., Federal Power Commission v. J. M. Huber Corp., 133 F.S. 479 (D.C. N.J. 1955); affirmed 236 F. 2d 550; cert. denied 352 U.S. 971, 1 L. Ed. 2d 324.

[5] Sections 1(b) and 2(7) of the Natural Gas Act.

[6] Section 1(b) of the Natural Gas Act.

[7] See e.g., Deep South Oil Co. v. Federal Power Commission (5th Cir. 1957), 247 F. 2d 882.

case subsequently styled *State of North Dakota* v. *Federal Power Commission*, 247 F. 2d 173 (1957).[8] The language was approved by the Commission and subsequently by the United States Court of Appeals for the Eighth Circuit in the following manner:

> "The FPC held that it has no jurisdiction over the sales made by Signal and Amerada under the 'firm gas' contracts. The holding was, of course, based on the finding that the 'firm gas' contracts were clearly *intrastate* in nature and accordingly outside the jurisdiction of the FPC." (Page 175)
>
> • • • • •
>
> "Our question is—referring only to the Tioga-Williston lateral distributions — does natural gas produced, wholesaled, transported, and sold within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because *part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce*, the purchase contracts for such gas distributed within the state having been executed with each supplier one day prior to execution of the corresponding interstate 'dump gas', contracts? The Examiner's answer to the question, which was approved by the FPC, was:
>
> " 'At the outset it should be noted that this Commission clearly has no jurisdiction over the sales made by Signal and Amerada under the 16¢ "firm gas" contracts. Under Section 1(b) of the Natural Gas Act this Commission has jurisdiction only over the transportation of natural gas in interstate com-

[8] A schematic diagram of the facts of this case is attached hereto as Exhibit "C".

(917)

merce, or the sale in interstate commerce of natural gas for resale. It has no authority

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to regulate intrastate sales. The gas sold under the instant 16¢ contracts is admittedly produced and consumed wholly within the State of North Dakota, both in the communities served from the Tioga-Minot line and in the communities served from the Tioga-Williston line. The conclusion that they are accordingly intrastate contracts is so obvious as to require no extended discussion. The fact that this gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9¢ "dump gas" interstate contracts does not convert the 16¢ "firm gas" contracts into interstate contracts.'

"We think the Examiner was eminently correct." (Page 176)

This case confirms an unquestioned, controlling principle: *A sale of gas, even for resale, with a contractual obligation that it be consumed in the state of production is not jurisdictional even though the gas be commingled with gas which has not yet but eventually will be transported beyond the state of production.*

And, of course, the *North Dakota* case was one in which the sale to the interstate pipeline was clearly a *sale for resale,* even though the resale was to take place in the state of production. The gas to be sold by Houston to El Paso Natural is not sold for resale, but is for consumption by El Paso Natural except that small part resold in Texas to Phillips for use by the latter as fuel.

This contractual separation of nonjurisdictional from jurisdictional gas in a physically commingled stream was the basis of the Commission's ruling and the Court's holding

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in *City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F. 2d 31, 32 (D.C. Cir. 1954).[9] In the *City of Hastings* case, gas from outside Nebraska was delivered into the distribution system of the City of Hastings, Nebraska. Within the city's distribution system the stream was either sold by the city to its citizens or consumed by the city as fuel in its power plant. Because the gas to be used by the city in its power plant as fuel (not for resale) was contractually separated from the commingled stream after being received by the city, the gas sold for use as fuel was nonjurisdictional.

Recently (February 3, 1959) in the matter of *Hope Producing Company*, Docket No. G-15537, the Commission permitted a Louisiana producer (Hope) to abandon jurisdictional sales to an interstate pipeline company (Arkansas-Louisiana Gas Company) in order that the producer could sell the gas d. ctly to a Louisiana customer of the interstate pipeline company with the gas being transported to that customer by the pipeline company. The gas transported by the pipeline company was commingled with gas destined for out of state and the Commission held, without hesitation, that the sale by the producer to the pipeline's customer was in intrastate

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commerce and therefore nonjurisdictional even though there was commingling of the gas.

The only other significant case arising under the Natural Gas Act dealing with the problem of Commission jurisdiction over a delivery of contractually separated gas from a commingled stream is the recent Commission decision in *Oklahoma Natural Gas Company*, Docket No. G-19593, and

[9] A schematic diagram of the facts of this case is attached hereto as Exhibit "D".

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Consolidated Gas Utilities Corporation, Docket No. G-19594, issued February 2, 1960, rehearing denied March 25, 1960.[10] This case clearly recognized the validity of the principle announced in the *North Dakota* case, discussed above, but held that principle inapplicable in the *Oklahoma Natural* case in which the gas was commingled with gas which had come from *beyond* the state as distinguished from being commingled with gas produced *within* the state as was done in the *North Dakota* case. The Commission also voiced its disapproval of an attempt to replace a jurisdictional sale to cities served by the pipeline with a nonjurisdictional sale of local gas.

Without regard to whether or not the *Oklahoma Natural* case is valid, it is not applicable here because none of the gas in the commingled stream will be produced outside the State of Texas.

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The Commission's disapproval in the *Oklahoma Natural* case of an attempted replacement of a jurisdictional transaction with what the Applicant there urged to be a nonjurisdictional intrastate transaction was obviously not considered by the Commission as a legal basis for its holding. The Commission in the *Hope Producing Company* case, supra, permitted the substitution of a nonjurisdictional intrastate sale to a pipeline company's customer for a jurisdictional interstate sale to the pipeline company. Thus, the fact that there previously existed an interstate jurisdictional transaction does not make the substituted transaction also interstate. The Commission, in the *Oklahoma Natural* case, was therefore voicing its disapproval of a substitution rather than holding that the substitution itself made the transaction interstate in character. However, the disapproved act of replacing a presently existing jur-

[10] A schematic diagram of the facts of this case is attached hereto as Exhibit "E".

isdictional transaction by a nonjurisdictional transaction will not occur here as El Paso Natural's use of gas as fuel and the sale by El Paso Natural to Phillips of fuel gas are not jurisdictional. No present jurisdictional sources of supply to El Paso Natural will be replaced—the supply will merely be increased.

Therefore, the *North Dakota* case, supra, and not the *Oklahoma Natural* case governs the proposed transaction. Because the proposed transaction will be intrastate, neither

Houston nor its producers will be subject to the jurisdiction of the Commission and Houston can make this sale to El Paso Natural without violating its contracts with its suppliers and without fear of losing its source of supply from these producers.

WHEREFORE, premises considered, Houston Pipe Line Company prays that the Commission enter a Declaratory Order that neither Houston Pipe Line Company nor the sellers of gas to it will become natural gas companies subject to the jurisdiction of the Commission under the Natural Gas Act on account of the proposed transactions described herein.

Respectfully submitted,

HOUSTON PIPE LINE COMPANY

By FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
Hugh Q. Buck
Jefferson D. Giller
Richard L. McGraw

By (S) HUGH Q. BUCK
8th Floor, Bank of the Southwest Building,
Houston 2, Texas
Its Attorneys

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THE STATE OF TEXAS }
COUNTY OF HARRIS }

HUGH Q. BUCK, being first duly sworn, deposes and says that he is an attorney and Attorney-in-Fact for Houston Pipe Line Company; that he has signed the foregoing document for and on behalf of the said Houston Pipe Line Company; that he is authorized to do so; that he has read said document and is familiar with the contents thereof; and that the matters and things set forth are true and correct to the best of his knowledge, information, and belief.

(S) HUGH Q. BUCK
Hugh Q. Buck

SUBSCRIBED AND SWORN To before me, a Notary Public, this 23rd day of December, 1960.

(S) MILDRED BITTNER
Notary Public in and for
Harris County, Texas

(SEAL)

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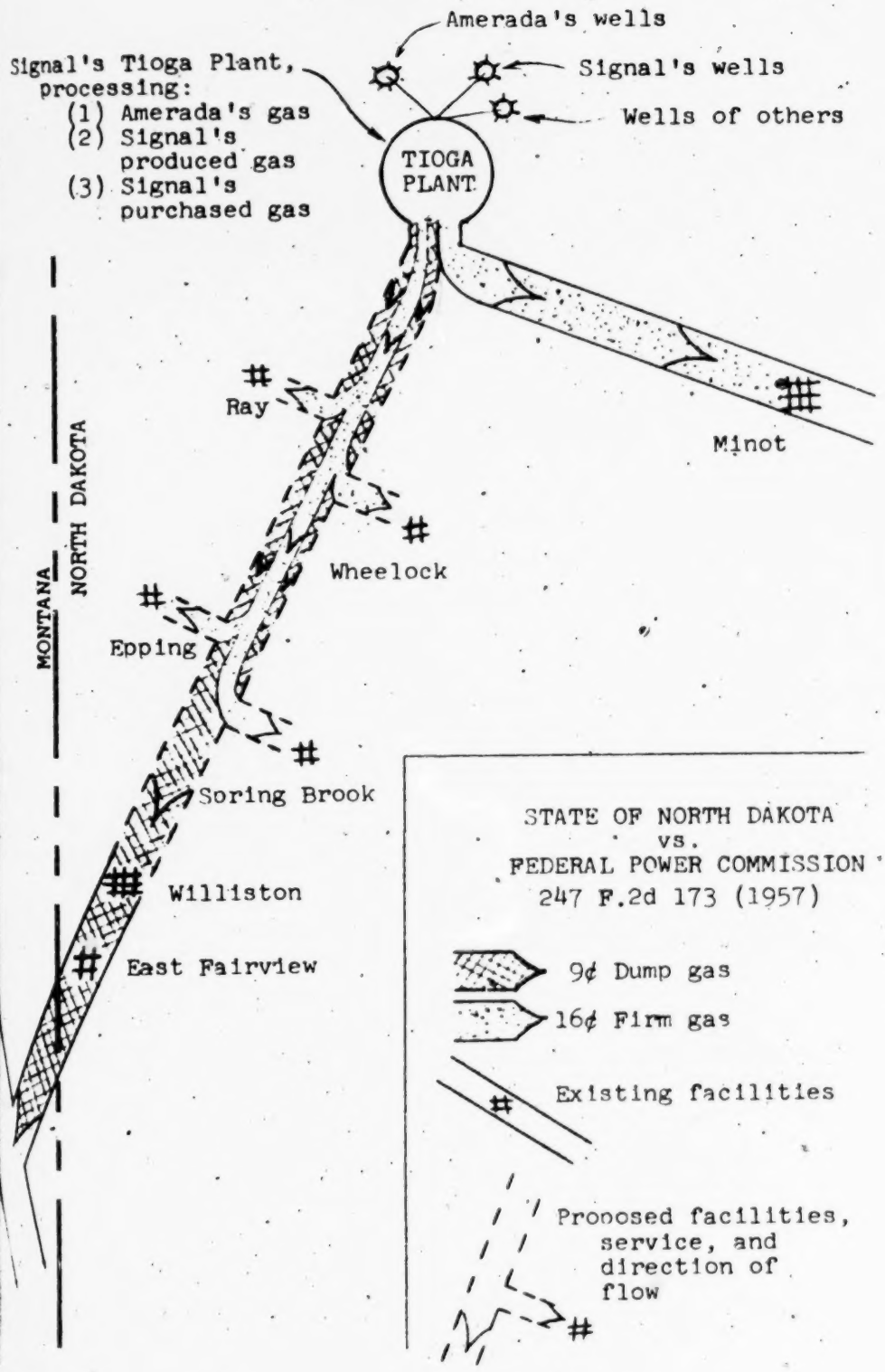
[CERTIFICATE OF SERVICE]


Amerada's wells
Signal's wells
Wells of others
Signal's Tioga Plant, processing:
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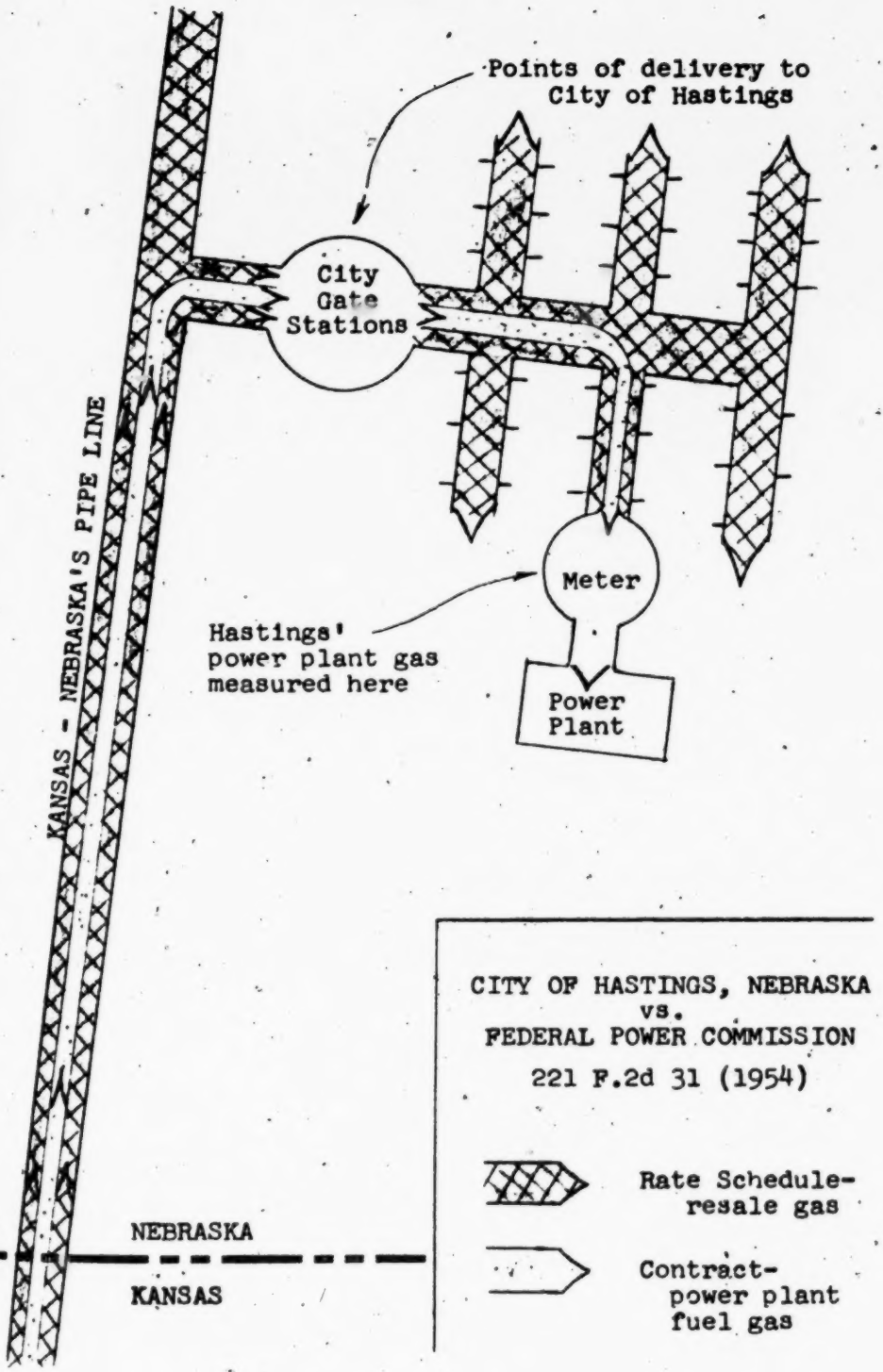
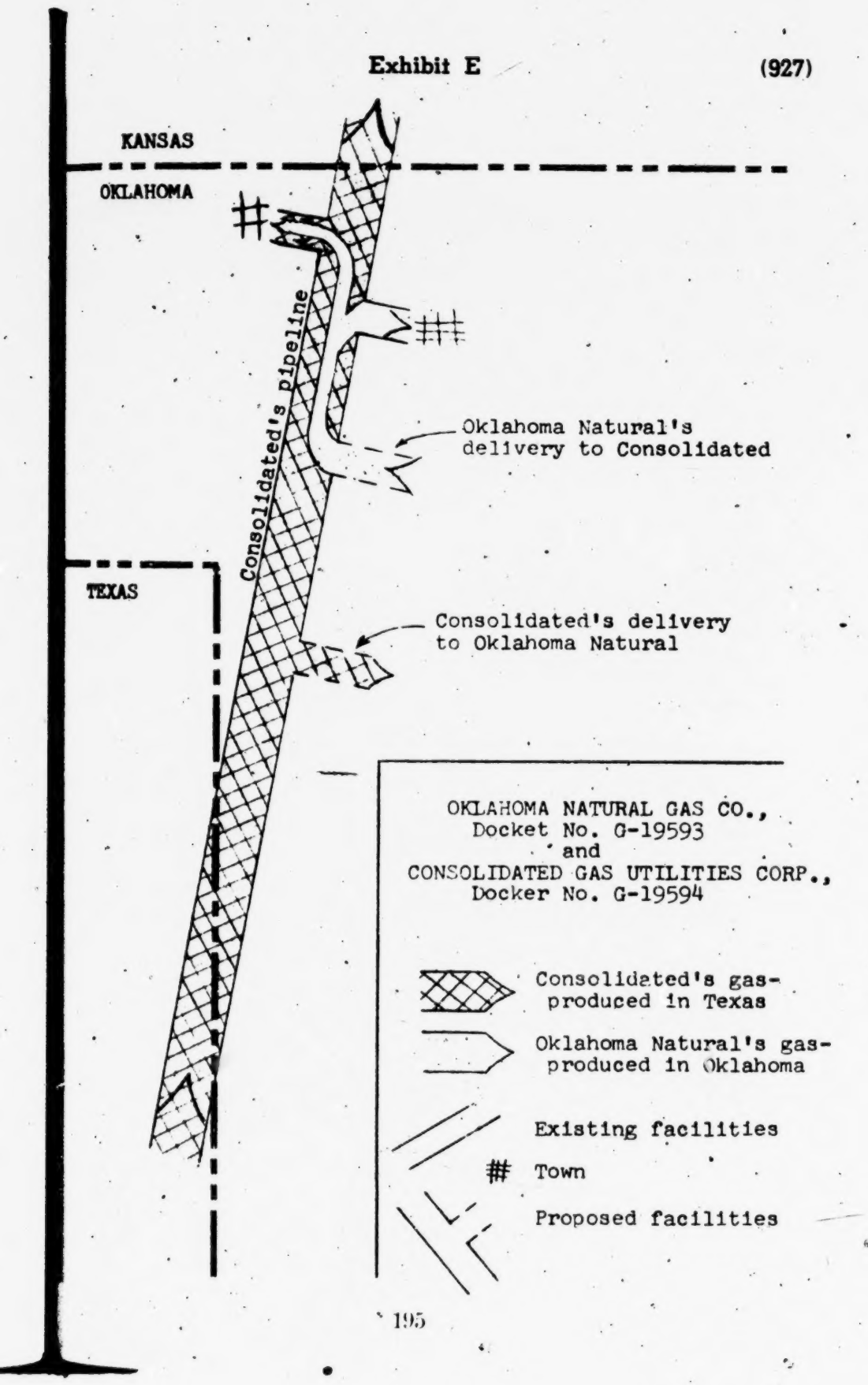
(2) Signal's produced gas
(3) Signal's purchased gas
TIOGA PLANT
Ray
Minot
Wheelock
Epping
Soring Brook
Williston
East Fairview
MONTANA
NORTH DAKOTA
STATE OF NORTH DAKOTA
vs.
FEDERAL POWER COMMISSION
247 F.2d 173 (1957)
9¢ Dump gas
16¢ Firm gas
Existing facilities
Proposed facilities, service, and direction of flow


Points of delivery to City of Hastings
City Gate Stations
KANSAS - NEBRASKA'S PIPE LINE
Meter
Hastings' power plant gas measured here
Power Plant
CITY OF HASTINGS, NEBRASKA
vs.
FEDERAL POWER COMMISSION
221 F.2d 31 (1954)
Rate Schedule- resale gas
Contract- power plant fuel gas
NEBRASKA
KANSAS


KANSAS
OKLAHOMA
TEXAS
Consolidated's pipeline
Oklahoma Natural's delivery to Consolidated
Consolidated's delivery to Oklahoma Natural
OKLAHOMA NATURAL GAS CO., Docket No. G-19593 and CONSOLIDATED GAS UTILITIES CORP., Docker No. G-19594
Consolidated's gas-produced in Texas
Oklahoma Natural's gas-produced in Oklahoma
Existing facilities
Town
Proposed facilities

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(Received Feb. 27, 1961)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of

Docket No. CP61-177

HOUSTON PIPE LINE COMPANY

Notice of Intervention of the People of the State of California and the Public Utilities Commission of the State of California

The People of the State of California and the Public Utilities Commission of the State of California (California Commission) hereby file notice of intervention in the above-entitled proceedings pursuant to the provisions of Section 15(a) of the Natural Gas Act and the provisions of Section 1.8 of the Rules of Practice and Procedure of the Federal Power Commission and as grounds for such notice respectfully show:

I.

The Attorney for the Public Utilities Commission of the State of California is empowered under Section 307 of the California Public Utilities Code to represent and appear for the People of the State of California and the California Commission in proceedings of this character. The California Commission, pursuant to the constitutional and statutory provisions creating it, has jurisdiction, among other things,

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to regulate rates and charges for the sale of natural gas by public utilities operating within California to consumers within this State (California Constitution, Article

(939)

XII, Sections 22 and 23; California Public Utilities Code, Sections 216 and 494,

II.

Approximately 75% of the natural gas consumed by customers of the public utility gas distribution companies in California is purchased from El Paso Natural Gas Company (El Paso). Furthermore, approximately two-thirds of the natural gas sold by El Paso is consumed in the State of Califorina. In its most recent tariff filing in Docket No. RP60-3, El Paso cited as one of the reasons for its need for increased rates the increased cost of gas supplied to it. It follows that such increased cost causes an increase in the rates and charges of such gas distribution companies, which in turn results in an increased cost of gas to the California consumers. Likewise, any increase in El Paso's other costs of operation, such as the costs of its compressor fuel, will also cause increases in the rates and charges of such gas distribution companies, which in turn will result in an increased cost of gas to the California consumers.

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III.

In the above-entitled proceeding Houston Pipe Line Company (Houston) seeks a declaration that the proposed sale of gas to El Paso is not subject to Federal Power Commission jurisdiction since the purchase agreement requires that all natural gas purchased thereunder be used solely for fuel in El Paso's compressors and other installations situated wholly in the State of Texas. El Paso has applied for certificate authority to construct and operate certain natural gas pipeline facilities incident to the acquisition and use of this gas from Houston in Docket No. CP61-26. California has intervened in that proceeding because the prices which El Paso agreed to pay Houston

(and others there involved) were substantially higher than prices elsewhere on its system. These increased prices which El Paso pays for compressor fuel will be included in its cost of service and, like increases in the price of gas for resale, will ultimately be passed on to California consumers.

Houston's petition in this proceeding (CP61-177) raises a question which will affect the outcome of matters before the Commission in Docket Nos. CP61-26, CP60-101, CI60-693 in which California is an intervenor. In addition, the concept presented by these applications, that earmarking certain gas supplies for a pipeline's own use and declaring that gas

so designated is non-jurisdictional makes it so in fact, represents a practice which, if allowed, will have a substantial impact upon the ultimate price of gas delivered to California.

IV.

The California Commission submits, under the facts above stated, that the outcome of these proceedings can and will have an important and direct effect on the natural gas consumers in the State of California. The interests of these consumers are best represented through the People of the State of California and the California Commission. It is respectfully submitted that the interests of the People of the State of California and the California Commission are separate from and independent of other parties to these proceedings, and for these reasons the People of the State of California and the California Commission should be allowed to intervene in these proceedings.

V.

The names, titles, and post office addresses of the persons to whom communications are to be addressed are:

William M. Bennett, *Chief Counsel*
J. Calvin Simpson, *Associate Counsel*
Walter G. Linstedt, *Counsel*
514 State Building
San Francisco 2, California

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Randolph J. Pajalich, *Secretary*
California Public Utilities Commission
521 State Building
San Francisco 2, California

Respectfully submitted,

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

By /s/ WILLIAM M. BENNETT
William M. Bennett
Chief Counsel

/s/ J. CALVIN SIMPSON
J. Calvin Simpson
Associate Counsel

/s/ WALTER G. LINSTEDT
Walter G. Linstedt
Counsel

Dated: February 21, 1961.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Docket No. CI60-693
LO-VACA GATHERING CO.

Docket No. CP61-177
HOUSTON PIPELINE COMPANY

Order for Hearing and Consolidating Proceedings

(Issued February 24, 1961)

Lo-Vaca Gathering Co., Corpus Christi, Texas, filed on June 1, 1960, pursuant to Section 7 (c) of the Natural Gas Act, an application for a certificate of public convenience and necessity authorizing the sale in interstate commerce for resale of up to 66,500,000 cubic feet of natural gas (@ 14.65 # psia) per day to El Paso Natural Gas Company, El Paso, Texas, and also an additional like volume of natural gas to be used by El Paso solely as fuel in its compressors and other facilities located outside Texas, all of such gas to be produced in Texas and sold at the initial price of 22¢ per Mcf.

Houston Pipe Line Company, Petroleum Building, Houston, Texas, filed on December 27, 1960, pursuant to Section 16 of the Act and Section 1.7(c) of the Commission's Rules of Practice and Procedure, a petition for a declaratory order to remove uncertainty as to the Commission's jurisdiction under the Natural Gas Act over a proposed sale by Houston to El Paso Natural Gas Company of up to 77,000,000 cubic feet per day of natural gas (@ 14.65 = psia) to be produced in Texas and delivered to El Paso at a point near Three Rivers, Live Oak County, Texas.

The contract between El Paso and Houston provides that the gas to be purchased thereunder, although commingled with other gas being transported in El Paso's pipe line, shall be used by El Paso solely as fuel in the operation of El Paso's facilities in Texas and in the gasoline plant of Phillips Petroleum Company in Ector County, Texas. The price will be determined according to a formula set out in the contract which would have produced a price of 19.5¢ for each one million BTUs delivered during the billing month of November, 1959. The contract provides that the gas sold thereunder shall have not less than 950 BTUs per cubic foot.

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The Commission finds:

It is appropriate in carrying out the provisions of the Natural Gas Act that a public hearing be held, limited as hereinafter ordered, and that the proceedings be consolidated for hearing and disposal.

The Commission orders:

(A) A public hearing, limited to the question of the Commission's jurisdiction over the proposed sale of gas by Houston for use as fuel in El Paso's facilities in Texas and in Phillips' gasoline plant in Ector County, Texas, and over the proposed sale of gas by Lo Vaca for use as fuel in El Paso's facilities outside Texas, will be held in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington 25, D. C., commencing March 21, 1961, at 10:00 a.m. (EST).

(B) The proceedings under the docket numbers in the caption hereof are hereby consolidated for hearing and disposal.

(C) Notices and petitions to intervene and protests may be filed with the Commission in accordance with Sections

1.8 and 1.10 of the Commission's Rules of Practice and Procedure (18 CFR 1.8, 1.10) on or before March 3, 1961.

By the Commission. Commissioner Kline dissenting, filed a separate statement.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

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Docket No. CI60-693
LO-VACA GATHERING CO.

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

KLINE, Commissioner, *dissenting:*

I see no reason for setting this matter down for hearing. The facts are not in dispute and the question of whether or not we have jurisdiction has been thoroughly briefed by the parties. In my opinion these sales are clearly intrastate in character and the Commission has no jurisdiction over them and I favor entering a declaratory order to the effect that we have no jurisdiction. I can see no reason for a long protracted hearing on an issue where the facts are not in dispute and where the issue is the identical issue which has been ruled upon by us several times in the past few years.

ARTHUR KLINE, *Commissioner*

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Decision

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

UPON APPLICATION AND PETITION TO DECLARE CERTAIN RESTRICTED-USE GAS CONTRACTS TO BE NONJURISDICTIONAL

(Issued August 11, 1961)

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APPEARANCES

For Lo-Vaca Gathering Company
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Bradford Ross, Esquire, Washington, D. C.
David I. Granger, Esquire, Washington, D. C.

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For Southern Counties Gas Company of California
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For Transwestern Pipeline Company
Raybourne Thompson, Esquire, Houston, Texas
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For El Paso Natural Gas Company and El Paso Gas Supply Company
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George D. Horning, Jr., Esquire, Washington, D. C.

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For the People of the State of California and California Public Utilities Commission
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For the Staff of the Federal Power Commission
C. Louis Knight, Esquire, Washington, D. C.

A. Syliabi of Points Decided

1. The proposed sale and delivery in Texas of gas produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas will not become a sale in interstate commerce because it is to be moved in a commingled stream with other Texas-produced gas destined for interstate commerce, where the respective volumes of interstate and intrastate gas are metered and known and the intrastate gas is separated from the commingled stream before any of the stream containing the interstate gas leaves Texas.

2. The producer and gatherer of such wholly intrastate gas will not become a natural-gas company because of its intrastate sale and delivery of such gas to a natural gas pipeline for local fuel consumption.

3. The sale and delivery in Texas of gas produced wholly in Texas, but to be transported outside of Texas, in commingled stream with Texas and New Mexico gas destined for resale in interstate commerce for ultimate public consumption, and to be consumed outside of Texas will be a sale in interstate commerce because the gas will have entered the stream of interstate commerce and will have passed across the Texas border where some portion thereof will be resold to consumers outside of Texas despite the contractual obligation of the natural gas pipeline purchaser to draw from the stream an equal amount of gas for fuel in its compressor stations located beyond the Texas border.

4. The producer and gatherer of such gas destined for transportation and sale in interstate commerce will be a natural-gas company subject to the Natural Gas Act because of its interstate sale and delivery thereof to a natural gas pipeline company.

B. Introductory Statement

Freer, Presiding Examiner: This case involves the question as to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act (Act) over certain proposed sales and deliveries of natural gas to a natural-gas pipeline company, by two producers and/or gatherers thereof, at least one of them and the pipeline company being natural-gas companies subject to the jurisdiction of the Commission under the Act. The question arises out of an application filed by Lo-Vaca Gathering Company (Lo-Vaca) on June 1, 1960, in Docket No. CI60-693 for authority to sell and deliver natural gas to El Paso Natural Gas Company (El Paso) pursuant to the provisions of two certain contracts more particularly described below and a petition for a declaratory order pursuant to Section 16 of the Act filed by Houston Pipe Line Company (Houston) on December 27, 1960, in Docket No. CP61-177.

C. History of the Proceeding

1. The Filings on Which Hearing Was Held

(a) In the application filed by Lo-Vaca on June 1, 1960 (Item A), the applicant seeks authorization not only for the "gathering and sale" of natural gas (including construction of necessary facilities) pursuant to an admittedly jurisdictional (Tr. p. 24) contract entered into on May 16, 1960, but also, for the "gathering and delivery" of natural gas pursuant to a contract dated March 15, 1960, for El Paso's fuel consumption outside of Texas (Tr. p. 46), both by the Applicant and El Paso Natural Gas Company and as more particularly hereinafter described.

(b) In the petition filed by Houston on December 27, 1960, pursuant to Section 16 of the Act, the petitioner seeks

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a declaratory order to remove uncertainty as to the Commission's jurisdiction over its proposed sale and delivery of natural gas to El Paso for El Paso's fuel consumption in Texas pursuant to a contract entered into on July 1960 (Ex. 2), as more particularly hereinafter described.[1]

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On February 24, 1960, the Commission issued an order consolidating and setting down for hearing the application and petition above described and limiting the hearing (and disposition) to the question of the jurisdiction of the Commission over the sales and deliveries described in the said restricted-use (fuel consumption) contracts of March 15, 1960, and July 29, 1960, respectively.[2]

II. The Filings in Related Pending Proceedings

(a) There is pending before the Commission an application by El Paso Gas Supply Company[3] (Supply), a wholly-owned subsidiary of El Paso, filed with the Commission on May 13, 1960, in Docket No. CP60-101, for a certificate of public convenience and necessity authorizing it to construct and operate a natural gas transmission system for transportation of the gas to be received from Lo-Vaca and Houston near Three Rivers in Live Oak County, Texas, for El Paso, which after compression is to be transported through 227.6 miles of proposed 30" pipeline from there to

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[1] On Ex. 1, a "System Map, Houston Pipe Line Company" is shown the construction contemplated by Houston and El Paso Supply Company in connection with Houston's sale and delivery of gas to El Paso. (Tr. pp. 106-7.

[2] Commissioner Kline, dissenting, stated that in his opinion no hearing was necessary and that he favored an order holding the sales to be intrastate and not within the Commission's jurisdiction.

[3] Supply's petition for intervention herein was denied March 30, 1961, on the ground that its and El Paso's interests both would be protected by El Paso's intervention, which had been granted on March 15, 1961.

a connection with El Paso's Sonora Plant in Sutton County, Texas (Exs. 5-A, 6, 7, 8, 9, 10; Item D). Under contractual arrangements not yet completed, El Paso will sell to Supply sufficient Houston gas to fuel and operate the facilities proposed to be constructed and operated by Supply. (Tr. pp. 268-69; Ex. 7; Item D, Sch. 1.)

III. The Interventions

Petitions to intervene filed by El Paso, Pacific, Southern California Gas Company and Southern Counties Gas Company of California (California Distributors), Transwestern Pipe Line Company (Transwestern), The People of the State of California and Public Utilities Commission of the State of California (California), were granted by order of March 15, 1961, and these intervenors participated in the hearings.[4]

Other petitions in intervene, filed by Supply and Texas, were denied by order of March 30, 1961; prior to said order, however, the privilege of limited participation had been allowed to these companies. (Tr. pp. 4, 7.)

IV. The Hearings

Pursuant to the Commission's Order for Hearing and Consolidating Proceedings, issued February 24, 1961, a public hearing before the undersigned hearing examiner was convened on March 21, 1961, and sessions were held also on March 22 and April 10, 1961.

Opportunity to file briefs was afforded all parties, and opening and reply briefs favoring exemption from jurisdiction were filed by Lo-Vaca, Houston and El Paso; the Staff, California and California Distributors (other than Pacific) filed briefs in opposition to exemption. In

[4] Pacific and Transwestern, while represented by Counsel at the hearings, neither cross-examined witnesses, nor offered evidence nor filed briefs.

all, 242 pages of briefs were filed, 89 pages for exemption and 153 pages in opposition.

D. The Issues

I. Limitation of Issues by Order of February 24, 1961

The Commission's Order for Hearing and Consolidating Proceedings, issued February 24, 1961, provided in pertinent part:

> "(A) A public hearing, limited to the question of the Commission's jurisdiction over the proposed sale of gas by Houston for use as fuel in El Paso's facilities in Texas and in Phillips' gasoline plant in Ector County, Texas, and over the proposed sale of gas by Lo-Vaca for use as fuel in El Paso's facilities outside Texas, will be held . . .
>
> "(B) The proceedings under the docket numbers in the caption hereof hereby consolidated for hearing and disposal."

The issues are whether Lo-Vaca's and Houston's proposed sales and deliveries of gas to El Paso under the contracts of March 15, 1960, and July 29, 1960, are subject to the jurisdiction of the Commission or whether such proposed sales and deliveries of either of them are exempt therefrom by reason of the provisions of the restricted-use contracts employed in making them. Since there is general agreement among the parties and the witnesses that some part of the gas proposed to be

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sold and delivered for fuel consumption in Texas[5] as well as a part of that proposed to be sold and delivered by

[5] El Paso's Reply Brief, p. 2, for example, states: "El Paso's argument . . . assumes that some of the molecules of the Houston gas will pass outside of Texas." (Cf. Tr. pp. 332, 343-44.)

Lo-Vaca for fuel consumption outside of Texas, inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumpiton in California, any exemption found for these sales, or either of them, must be rested on those provisions of the contracts which seek to avoid jurisdiction.

II. Contentions of the Parties

(a) Lo-Vaca's position (Initial Brief, pp. 3-5) is as follows:

> ". . . The sale is a direct sale to El Paso for its use in its own facilities, and as such, is not within the Commission's jurisdiction . . . direct sales of natural gas being other than sales for resale, are not within the Federal Power Commission's jurisdiction under the Natural Gas Act . . ."
>
> • • • • •
>
> "Lo-Vaca's gas . . . will be commingled in El Paso's interstate pipeline, in order to transport it to the facilities where it will be consumed. However, the fact that natural gas which is the subject of a non-jurisdictional direct sale is transported in a commingled state with natural gas which is being sold in interstate commerce for resale and thus jurisdictional does not cause the non-jurisdictional character of the former sale to be lost where the non-jurisdictional sale takes place in a separate and distinguishable form . . ."

(b) Houston's position is stated in its Reply Brief (pp. 4-5) as follows:

> "Houston's position is: *A sale of gas, even for resale, with a contractual obligation that it be consumed in the state of production is not jurisdictional even*

though the gas be commingled with gas which has not yet but eventually will be transported beyond the state of production." (Emphasis supplied by Houston.)

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(c) El Paso's position is "that the restricted use contracts are non-jurisdictional" (Initial Brief, p. 3), which position is amplified in its Reply Brief (p. 2) as follows:

> ". . . there is no dispute . . . that 'following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed [as fuel] or remained in the commingled stream (R. 344)' . . . [and] (R. 332, 343) that there is no assurance that the specific molecules of gas sold to El Paso by either Houston or Lo-Vaca will be consumed as fuel in El Paso's compressor stations . . . the case law unequivocally holds that preservation of the separate molecular identiy of certain purchased gas throughout its transportation is not essential to a determination that it remains in *intrastate* commerce although it becomes a part of a commingled stream, the rest of which may be in *interstate* commerce . . ."

Particularly so (Reply Brief p. 2) with respect to the Houston gas:

> ". . . extraction of the gas of Houston as such is *not* essential to the consumption of the gas of Houston solely as fuel in Texas in any meaningful legal sense . . ." (Emphasis supplied by El Paso.)

(d) The Commission Staff states "the principal legal question presented (Brief, p. 1) to be:

> ". . . whether a seller and a buyer of natural gas can prevent, by contract, sales of natural gas from

being subject to FPC jurisdiction when the gas flows in continuous movement from State to State, commingled with gas from other sources, with gas from the commingled stream being resold for ultimate public consumption."

Staff's contentions as to this question are stated in its brief (pp. 11-12), as follows:

". . . the sales of gas proposed by Lo-Vaca and Houston will be sales in interstate commerce for resale and, therefore, they will be subject to FPC jurisdiction. Lo-Vaca and Houston, however, contend that the contract provisions, . . . limiting the use of gas will prevent the sales made under their said contracts with El Paso . . . from being sales in interstate commerce for resale and will forestall FPC jurisdiction. They do not claim that, absent such contractual limitations on use, their gas sales would

not be in interstate commerce for resale and would not be subject to FPC jurisdiction. To the contrary, the avowed purpose of including in their contracts the limitations on use of gas was to circumvent jurisdiction."

(e) California's position, so far as it is pertinent to the limited issue herein presented (*infra*, footnote No. 10), is stated in its brief under "Conclusions" (pp. 12-13), as follows:

". . . in addition to the fact that some of the gas will mix with out-of-state gas prior to use even under the best conditions, *it is impossible to assure that the gas purchased will be used as specified, and some, necessarily, will be transported out-of-state and resold.*

> "It is likewise obvious that both 'restricted' and 'unrestricted' gas will be used interchangeably. When intake of one is cut down, the other will increase, and *vice versa*. Complete integration in supply is not only likely, but essential. El Paso's system requirements demand it." (Emphasis supplied by California.)

(f) California Distributors (other than Pacific) state their concept of the issues in their joint brief (p. 18) as follows:

> "The basic issue to be determined in this jurisdictional proceeding is whether the jurisdiction of the Federal Power Commission depends upon the actual flow of a commingled supply of natural gas in interstate commerce, or whether the question of jurisdiction is determined by whether a contract provides for the use of this commingled gas for nonjurisdictional purposes although physically, regardless of the contractual provision, the commingled gas must flow in interstate commerce. Stated in another fashion, the issue is as to whether the jurisdiction of this Commission is dependent upon fact rather than fiction, upon *actual flow* rather than upon *contractual flow*." (Emphasis supplied by California Distributors.)

Their conclusion as to the interstate nature of the transactions is stated in said joint brief (p. 32) as follows:

> "From the moment that Houston and Lo-Vaca gas is received into the El Paso interstate pipeline system at Three Rivers, Texas, such gas will form a portion of a commingled supply of gas flowing in interstate commerce . . ." (Cf. Exhibit A to said brief.)

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E. The Facts in Evidence

I. Corporate Status and Present Operations

(a) *Lo-Vaca* is a Texas corporation with its principal place of business in Corpus Christi, Texas (Item A). It "was organized to purchase, gather and deliver gas to El Paso" with which it has two contracts, executed on March 15, and May 16, 1960, respectively.[6] (Tr. p. 8.)

Lo-Vaca owns no facilities and engages in no operations; its operations including the proposed deliveries to El Paso will take place only when the facilities proposed to be constructed by Supply (Docket CP60-10) and by Lo-Vaca (Docket CI60-693) are authorized and completed.

(b) *Houston* is a Texas corporation having its principal offices in Houston, Texas (Petition p. 1). It is a wholly-owned subsidiary of Houston Natural Gas Corporation, which (like Houston) has been engaged for some years in a wholly intrastate business (Tr. pp. 104, 106).

Since 1925 Houston has engaged in the purchase, transportation and sale of natural gas within the State of Texas (Tr. p. 104). Currently, it delivers about 500,000 Mcf daily to local distribution companies for resale for consumption in various Texas communities and to industrial and commercial consumers located in the Texas Gulf Coast (Ex. 1) area. Many of its purchase contracts contain a jurisdictional escape clause. (Ex. 4; Tr. pp. 15, 109, 111, 128-129.)

There are no present deliveries of Houston gas to El Paso. Deliveries are not physically possible until com-

[6] The May 16 contract is admittedly subject to the Commission's jurisdiction (Tr. pp. 21-24); but the March 15 contract is claimed to be exempt, because the gas is to be used by El Paso solely as fuel in El Paso's compressors and other facilities outside of Texas, enroute to which said gas will be commingled with other gas being transported in El Paso's pipeline system (Tr. pp. 8-9).

pletion of construction by Houston and Supply; and they are not contractually possible until and unless the Commission declares that Houston's contract with El Paso "is a non-jurisdictional transaction." (Tr. p. 16; Ex. 2, p. 6.)

II. The Gas Sales Contracts

(a) *Lo-Vaca—El Paso jurisdictional contract of May 16, 1960.* By this admittedly jurisdictional (Tr. p. 24) contract,[7] Lo-Vaca agrees

to sell and deliver 50,000 Mcf[8] average per day (at 14.65# psia) of natural gas to El Paso at or near Three Rivers, Texas, at which delivery point title thereto vests in El Paso. The contract, which is free of all restrictions upon interstate transportation and resale in interstate commerice by El Paso (Tr. pp. 8, 21-24), is for 20 years at an initial price of 22¢ per Mcf, plus certain taxes, and escalating to 26¢. El Paso agrees to "take or pay" for certain minimum volumes, and Lo-Vaca agrees to dedicate reserves in the Texas Gulf Coast area to the performance of the contract.

(b) *Lo-Vaca—El Paso restricted use contract of March 15, 1960*—This contract is substantially identical with the May 16 jurisdictional one, being likewise for 20 years for like volumes at like pressure and like prices and with like take-or-pay provisions and like dedication of reserves.

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[7] This sale of gas for which Lo-Vaca seeks a certificate of convenience and necessity, is herein involved only because of its effect on El Paso's task of separating this jurisdictional gas from the Lo-Vaca restricted use gas to be delivered to El Paso in a commingled stream with it and with Houston's restricted-use gas.

[8] Letter agreement (Ex. 11) has been negotiated to increase this quantity to 80,000 Mcf. (Tr. pp. 207-08, 213-16.)

The important difference is that, in addition to the employment therein of the words "gathering and delivery," in lieu of the "gathering and sale" appearing in the May 16 contract, this contract provides in Article X, Section 2:

> "It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale."

Also, in Article XVI it is provided that—

> "All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

By letter filed with the Commission on November 25, 1960 (Tr. pp. 23-24), Lo-Vaca states its intention to deliver the contractual quantities under both contracts, reserving its right to contest with respect to jurisdiction over the sales of the restricted use gas. (Tr. p. 9.)

(c) *Houston-El Paso restricted use contract of July 19, 1960*—Reciting El Paso's desire to purchase gas for consumption in Texas as fuel in its facilities and in the operation of Phillips' gasoline plant in Ector County, Texas, this contract for 70,000 Mcf per day is for

20 years, subject to earlier termination. As with the Lo-Vaca contract, this gas is to be delivered by Houston to Supply (for El Paso) at or near Three Rivers, Live Oak County, Texas, and El Paso will take title thereto at said

point of delivery. Sales are to be on an interruptible basis (Article XV). The price is to be determined according to a formula which, if applied for the billing month of November 1959, would have produced a price of 19.5¢ plus certain taxes for each unit of one million BTU. The gas to be of not less than 950 BTU per cubic foot.) El Paso agrees to pay for the 1,000 Mcf per day if available whether or not taken.

Restriction on the use of the gas is stated in Article II as follows:

> "2.1 . . . Accordingly, it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. El Paso shall advise Houston as to each such utilization to be made of the gas purchased hereunder, and no new or different utilization of such gas shall be made by El Paso without the prior written consent of Houston. El Paso further covenants and agrees that at no time during the term of this agreement will El Paso take from Houston a quantity of gas in excess of the quantity of gas being consumed at the same time in Texas by El Paso for uses agreed to hereunder by Houston. If, by inadvertence or mistake or for any other reason, El Paso shall at any time during the term hereof take from Houston hereunder a greater quantity of gas than is being so utilized, El Paso covenants that the same shall be sold or utilized

by El Paso solely in intrastate commerce for use and consumption within the State of Texas.

"2.2 El Paso covenants that all components of El Paso's plant consuming fuel gas hereunder shall physically be located on its system of pipe lines and laterals within the State of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the originating delivery point defined hereunder. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into

components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volume of gas contributed into the commingled stream at Three Rivers by Houston. . . ."

III. The Proposed Operations and Flow of Gas.

(a) *Lo-Vaca*—Under both the unrestricted and restricted use contracts, gas will be produced and/or gathered by Lo-Vaca at wellheads in the field (in Texas, Tr. pp. 24-26) and delivered (for El Paso) by Lo-Vaca in a commingled stream (Tr. pp. 266-67), to Supply's proposed Coquat Compressor Station at or near Three Rivers, Live Oak County, Texas.

(b) *Houston*—The Houston gas will be gathered by Houston at well-heads in the field (in Texas, Tr. p. 104), and delivered (for El Paso to Supply's proposed Coquat Compressor Station at or near Three Rivers, Texas, for transportation by Supply to El Paso at Sonora, Texas. At that station, Houston's gas will be commingled with the commingled stream of Lo-Vaca gas (Tr. pp. 266-68).

(c) *Supply*—Houston's gas will be separately metered before it is commingled at Coquat Station with Lo-Vaca gas (Tr. p. 268) for transportation by Supply in a commingled stream with Lo-Vaca gas (including Lo-Vaca's admittedly interstate gas) through 227.6 miles of 30" pipeline which Supply proposes to construct and operate (Docket CP60-101) from Three Rivers to El Paso's Sonora Plant in Sutton County, Texas (Tr. p. 271; Exs. 5-A, 6, 7, 8, 9, 10; Item D). Under arrangements to be made with El Paso (Tr. p. 269), Supply will use some of this gas (about 1,460 Mcf per day—at 14.73# pb.) to operate its said Coquat Station at Three Rivers and its said transmission line from there to Sonora (Tr. p. 268; Ex. 7; Item D, Sch. 1).

(d) *El Paso*—Assuming Commission authorization therefor (Docket CP61-26), and the completion of Lo-Vaca's and Supply's proposed facilities and of its own new fuel lines and other necessary facilities (Tr. p. 135), El Paso proposes to route the commingled stream of Lo-Vaca and Houston gas (supplemented by additions to that stream at certain other points on its system, Tr. pp. 271, 282; 289-90, 307-8; Item B) to its fuel-consuming compressor stations located downstream of Sonora (Tr. p. 157, Ex. 7, 8), and at said stations to extract from the said commingled stream in the aggregate quantities of gas for such use equal to or greater than those it has agreed with Houston to extract and use

in Texas and with Lo-Vaca to extract and use beyond Texas.[9] Flow diagrams and maps for such plant fuel use

[9] By contract, Lo-Vaca's gas is to be transported and used by El Paso outside of Texas. El Paso concedes that some of Houston's gas likewise physically will pass outside of Texas, stating (Reply Brief, p. 2), "there is no dispute that 'following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed [as fuel] or remained in the commingled stream (R. 344).'" (Cf. also Tr. p. 282 and Ex. 10.)

on an average demand day and a maximum demand day and the detailed oral testimony of El Paso's chief pipeline engineer fully illustrate El Paso's proposed fuel line construction and the quantities of fuel gas thereafter to be metered and withdrawn physically at these stations downstream of Sonora from the commingled stream containing the Lo-Vaca and Houston gas in accordance with its agreement to use such gas as fuel. (Lo-Vaca's outside of Texas and Houston's entirely in Texas.) (Exs. 5-A, 7, 8, 9, 10; and see also Map Ex. 6 and Hr. pp. 285-88: Items B and D.)

F. Discussion

I. The Statutes

Three sections of the Act warrant discussion. Section 7(c) provides, in pertinent part:

> "No . . . person which will be a natural-gas company upon completion of any proposed construction . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction . . . of any facilities therefor, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . ."

Section 2(6) defines a "natural-gas company" to mean "a person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale."

Section 2(7) defines "interstate commerce" to mean "commerce between any point in a State and any point outside thereof . . ."

Most important is the scope of the Commission's jurisdiction under the Act.

Section 1(b) provides in pertinent part:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural-gas for resale for ultimate public consumption for domestic, ... or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas . . ."

Lo-Vaca concedes that it will be a natural-gas company when it engages in the sales and deliveries of gas proposed to be made to El Paso under the unrestricted May 16, 1960, contract, and it seeks authorization therefor (Docket CI60-693). It intends also to make the sales and deliveries proposed to be made under the March 15, 1960, restricted-use contract whether or not such sales are held to be likewise subject to its jurisdiction (Tr. pp. 9, 23-24), reserving its right to contest any determination of jurisdiction over the sales of the restricted use gas.

Houston, on the other hand, seeks no authorization for its proposed construction and restricted-use sales and deliveries to El Paso, and does not intend to carry out its contract if its proposed sales and deliveries are found to be subject to the jurisdiction of the Commission. (Tr. p. 16 and Ex. 2, p. 6.)

Section 1(b) and the applicable cases interpreting said section are thus determinative of the question the Commission's jurisdiction over Lo-Vaca's and Houston's proposed sales and deliveries under the restricted-use contracts, or either of them. In this connection, Lo-Vaca contends that its restricted-use contract is for a direct sale (not a sale for resale); Houston contends that its restricted-use sale

not only is likewise a direct sale but also that it is purely an intrastate sale. Both claim exemption for these contracts under various court and commission cases which have construed Section 1(b),—primarily relying upon *State of North Dakota* v. *F.P.C.*, 247 F. 2d 173.

The staff contends that Houston's sale and delivery as well as those of Lo-Vaca will be in interstate commerce and for resale.

California contends that since "all the gas [Houston's and Lo-Vaca's] will be transported in a commingled stream with other Texas-produced gas which is admittedly jurisdictional . . . any restriction is a contractual

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one, not physical. (R. 200-1);" also that El Paso's proposal for carrying out its contractual obligation "is *incapable* of meeting the stated objective of the contracts of use solely as fuel and within or without Texas."[10]

The California Distributors (other than Pacific) like the Staff and California consider the restricted use contracts as "a subterfuge to escape regulation" (Brief, pp. 7-8) "because as a matter of physical fact, the gas [Houston's as well as Lo-Vaca's] must and does flow out of the State of Texas as part of the commingled stream and, in fact, a portion thereof does flow to California to be used for purposes of resale." To a considerable extent these intervenors and the Staff rely on *Oklahoma Natural Gas Co.*, 23 F.P.C. 291 and 531.

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[10] Aside from the effects of "the fact of commingling," California urges, irrelevantly to the limited issues herein, that "since the volume purchased was based on a maximum day, and the facilities cannot use the whole of this volume on an *average* day, it follows that some of the 'restricted' gas *cannot physically* be used *'solely as fuel'* nor within the appropriate geographical area," particularly on *minimum* days. That issue, like those of price and public convenience and necessity, were postponed for later determination in the certificate proceedings (Tr. pp. 290-97).

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II. The Applicable Decisions

A large number of decisions by the Courts and the Commission are cited in the briefs of the parties, the same cases generally being cited by the opposing parties, but with differing interpretations of their holdings and/or the applicability thereof to the issues herein.

Controlling Decisions as to Houston Contract—A very recent decision by the Commission appears to be dispositive of the question of jurisdiction insofar as it relates to Houston.

This most recent decision of the Commission is its Order Modifying and Adopting the Initial Decision of Presiding Examiner, issued June 30, 1961, in *Shell Oil Company, et al.*, Dockets No. G-5029, *et al.* (24 FPC).

> ". . . we are unable to find any basis for concluding that we have jurisdiction over Shell's sale of gas to Columbian for the latter's Seminole carbon black plant . . .

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> Although neither the *North Dakota* nor the *Oklahoma Natural* cases, nor any of the cases cited by the parties are precisely in point, in its crucial facts the present case more closely resembles the circumstances of the first named than any of the others. Under Section 1(b) of the Act, we have jurisdiction over 'the sale in interstate commerce of natural gas for resale,' and 'the transportation of natural gas in interstate commerce.' Here we have a sale of gas produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas. This local gas is not commingled

[11] This decision was issued too recently to be mentioned in the briefs herein. The Presiding Examiner's Decision which was therein modified by the Commission was discussed in several briefs.

with any gas from outside the state, and all of it is separated from the commingled stream before any of the stream leaves the state . . . These facts which differentiate this case from the *Oklahoma Natural* case, provide no basis for a finding that this is a sale in interstate commerce."

The Commission's Order further states (p. 7):

". . . And although the gas for the Seminole plant is commingled with gas for El Paso destined for interstate commerce . . ., the respective volumes of interstate and intrastate gas are metered and known, and all the intrastate gas is separated from the commingled stream before any of the gas leaves Texas. Thus there is likewise lacking any basis for finding that the movement of the Seminole gas to its destination is transportation in interstate commerce."

The proposed sale by Houston, therefore, appears to be clearly an intrastate sale under the *Shell* case,—and the *North Dakota* case the "crucial facts" of which *Shell* closely resembles. Houston's proposed sale is not a sale for resale in interstate commerce.[12]

As in *Shell*, the Houston gas is to be "produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas."

Also, as in *Shell*, "[t]his local gas is not [to be] commingled with any gas from outside the state, and all of it is [to be] separated from the commingled stream [containing also Lo-Vaca gas destined to leave Texas] before any of the stream leaves the State." (Docket G-5029, *et al.*)

[12] Except for the gas to be resold to fulfill fuel requirements of Supply in Texas and those of Phillips' gasoline plant in Ector County, Texas, it is not a sale for resale in *intrastate* commerce. (Tr. pp. 141, 269.)

Likewise, under the *Shell* and *North Dakota* cases, the proposed movement of Houston's gas appears to be clearly intrastate, since the volumes of Houston gas "are [to be] separated from commingled stream before any of the gas leaves Texas." (*Shell* Order p. 7.)

Controlling Decision as to Lo-Vaca Contract—Lo-Vaca's restricted-use gas, on the other hand, is to be transported outside of Texas for use as compressor station fuel beyond the borders of that state. The proposed movement will be "transportation of natural gas in interstate commerce," and, therefore, subject to the Commission's jurisdiction.

Despite Lo-Vaca's contentions that its proposed restricted-use contract is not a sale for resale, it appears that such contract itself also may be subject to jurisdiction, as a "sale in interstate commerce of natural gas for resale," under authority of *Oklahoma Natural Gas Company, et al.*, 23 F.P.C. 291, and Order Denying Rehearing, 23 F.P.C. 531,—a case in which the "crucial facts" are similar.

Since the *Oklahoma Natural* case is so closely in point as to appear to be dispositive of the question of our jurisdiction over Lo-Vaca, liberal quotation therefrom is herein made.

In the original decision, the Commission stated:

> ". . . Consolidated in transporting gas from Texas for sale in Oklahoma and Kansas is a 'natural-gas' company . . : Oklahoma Natural's gas is, of course, commingled with Consolidated's gas in the pipeline. While Consolidated, . . . proposed to sell and deliver for consumption in Oklahoma an amount of this commingled gas that is at all times in excess of the amount of gas delivered by Oklahoma Natural, it is inevitable

that some of Oklahoma Natural's gas commingled with Consolidated's gas will be physically transported out of Oklahoma for consumption outside the state . . ." (23 F.P.C. 291, 292-93.)

Concerning the contractual provisions the Commission said:

"The exchange agreement provides: 'Consolidated further agrees that all of the volumes of gas delivered by Oklahoma Natural to Consolidated hereunder will be used and consumed only within the State of Oklahoma and that such volumes of gas will, under no circumstances, be transported by Consolidated in interstate commerce or resold for transportation and/or resale in interstate

commerce. It is understood, however, that . . . before any portion of the gas stream has left the State of Oklahoma it will be metered and determined that the volumes of gas metered and sold by Consolidated in its Northern Oklahoma system are at all times more than the volumes of gas being delivered to it by Oklahoma Natural.' " (23 F.P.C. 291, 293.)

The Commission's conclusions were:

"In our opinion the provision in the exchange agreement does not prevent Oklahoma Natural from being a natural-gas company within the meaning of the Act. Section 2(c) of the Act defines a 'natural-gas company' as 'a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.' 'Interstate commerce' is defined in part to mean 'commerce between any point in a State and any point outside thereof.' Interstate commerce has taken place here because

Oklahoma Natural has delivered gas which is transported outside the state and consumed outside it. *Interstate Gas Co.* v. *F.P.C.*, 331 U.S. 682, 687-689. This gas has entered the stream of interstate commerce, and has passed across the state border. As was said in *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882, 888 (CA5) 'The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently there can be no question that petitioner is making sales for resale within the meaning of the Act.' The fact that the contracting parties agree that Consolidated will deliver to its Oklahoma customers a greater amount of gas does not affect the interstate character of the transactions. The fact that Consolidated has not increased its deliveries to its Oklahoma customers, shows that by means of a contractual provision Consolidated is attempting to substitute Oklahoma Natural's gas for its interstate gas from Texas in making its Oklahoma deliveries. We do not think that the later contract can so effect the previous course of business." (23 F.P.C. 291, 293.)

Subsequently, in its Order Denying Rehearing, the Commission reaffirmed the previous decision, stating:

". . . By contract with Oklahoma Natural, it would at all times deliver more gas to these customers than it would receive from Oklahoma Natural, but . . . admittedly Oklahoma Natural's gas became commingled with interstate gas in Consolidated's pipeline and was thus undeniably transported, in part, out of Oklahoma.

"What we have here, is a sale of Oklahoma produced gas for resale to an interstate pipeline which would

then deliver this gas, commingled with gas from out-of-state sources, to customers in both Oklahoma and Kansas. Sales to such an interstate system would be, in our opinion, part of the interstate course of business and would be clearly in interstate commerce . . ." (23 F.P.C. 531, 532.)

Characterizing the contract's attempt to avoid jurisdiction as a device, the Commission's order stated:

"The contractual device of providing that Oklahoma Natural's gas shall be used in Oklahoma would not affect the interstate nature of the transaction that the parties proposed. It is a mere statement that does not alter the course of operations other than to require that Consolidated continue to make deliveries in Oklahoma. If the contract were able to have the effect claimed, every producer or other seller of gas within a given state which sells gas to an interstate pipeline could escape jurisdiction if the pipeline happened to sell an equal or greater quantity of gas within the same state, and the seller had the right kind of contract with the pipeline. A problem would then be posed as to which sellers of gas had the privilege of being considered non-jurisdictional and which ones must be considered to be making the interstate sales." (23 F.P.C. 531, 533.)

Both in its original *Oklahoma Natural* decision and in its Order Denying Rehearing, the Commission carefully distinguished the *North Dakota* case, saying in the former:[13]

[13] Chairman Kuykendall in his concurring opinion expressed the distinction thus: "In *State of North Dakota* v. *FPC*, 247 F. 2d 173, the gas over which we did not have jurisdiction was produced, transported, sold and consumed within the same state. *It was commingled and transported with gas which also had been produced within the state but eventually was transported out of the state and thus into interstate commerce. In other words the gas*

"In our opinion, *State of North Dakota* v. *F.P.C.* ... is distinguishable from the present case. In that case Montana-Dakota Utilities Company entered into contracts at approximately the same time for the purchase of 'dump' gas at the price of 9 cents per Mcf at a processing plant belonging to other parties at Tioga, North Dakota, and for the purchase of 'firm' gas at the same point for 16 cents per Mcf. All of the gas was to be produced in North Dakota . . . part of the 16 cent gas, . . . was to be transported by the Tioga-Williston line and was allegedly to be delivered by four proposed laterals to four towns in North Dakota where it would be consumed . . . We held with the examiner that the sale of the firm 16 cent gas to Montana-Dakota was entirely intrastate and were affirmed by the Court . . ." (23 F.P.C. 291, 294.)

In the original decision, the contrast was stated thus:

"In the present case the parties have attempted to keep Oklahoma Natural's gas separated from Consolidated's interstate stream, with which it is physically mixed, and to arrange by a contractual provision that all of Oklahoma Natural's gas be delivered in Oklahoma .... Consolidated had already been delivering its own gas received from Texas to its Oklahoma customers. Its sales to these customers were, of course, sales in interstate commerce within the meaning of the Gas Act. The later introduction of Oklahoma Natural's

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transported intrastate was never transported or commingled with any gas which had entered and was in interstate commerce. Here the gas in question would enter, be commingled with, and transported with a stream of gas which already had been and still would be moving in interstate commerce. That is the *salient distinction* between the two situations." (Emphasis supplied.) (23 F.P.C. 291, 296.)

gas into Consolidated's pipeline does not even from a conceptual viewpoint cause Oklahoma Natural's gas to be delivered to these customers alone. The situation therefore is different from that in the Montana-Dakota case where separate contracts with separate prices and for separate kinds of service were executed at approximately the same time, so that it could be said that in spite of physical commingling the firm gas was identifiable and determinable and therefore intrastate . . . It would be a mere subterfuge to determine that the gas Oklahoma Natural would deliver to Consolidated in lieu of interstate gas, would be in intrastate commerce and nonjurisdictional.

"There is here more than a mere technical objection to the exemption requested . . . Because the amount of gas flowing in the interstate stream is altered by Oklahoma Natural's deliveries consumers beyond the state boundary are affected. This is the sort of thing that represents 'commerce which concerns more States than one.' It was intended by the Gas Act that we regulate such interstate commerce, and we have no choice but to deny the request for an exemption." (23 F.P.C. 291, 294-5.)

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And in the Order Denying Rehearing saying:[14]

"In *North Dakota* v. *F.P.C.*, . . . separation was achieved under different circumstances. Certain producers sold gas produced in North Dakota to Montana-Dakota Utilities at the tail-gate of a gasoline plant in North Dakota . . . all of the gas received at the gaso-

[14] The Commission also distinguishes on pages 533-34, *U.S.* v. *P.U.C.*, 345 U.S. 295; *Penna. Water & Power Co.* v. *F.P.C.*, 343 U.S. 414, 419; *Peoples Natural Gas Co.* v. *P.S.C.*, 270 U.S. 550; and *Hope Producing Co. et al.*, Docket No. G-15537, Feb. 3, 1959.

> line plant which is delivered in North Dakota, was purchased in North Dakota . . . in the present case . . . Consolidated's pipeline carries both Oklahoma and Texas produced gas and its deliveries to its customers in Oklahoma include gas produced in Texas. In the *North Dakota* case there was a direct association between the sale of the 16 cent gas to Montana-Dakota and its delivery in North Dakota. In the present case, Consolidated's sales had no prior association with Oklahoma Natural's gas, for there was an interstate system already operating and delivering gas in Oklahoma and Kansas. Injecting Oklahoma produced gas into that system even with a contract that an equal amount of gas would always be delivered in Oklahoma does not alter the interstate nature of Consolidated's operations and Oklahoma Natural's sale." (23 FPC 531, 533-34.)

In its Order Denying Rehearing, the Commission, therefore, concluded as follows:

> "In view of the above considerations and our previous order, Oklahoma Natural's sale to Consolidated is a sale for resale in interstate commerce. It appears Oklahoma Natural is a pipeline company as well as a producer, and there is no controversy on this point. Therefore Oklahoma Natural is a 'natural-gas' company as a pipeline company, and we have no option but to assert jurisdiction, but in any case, Oklahoma Natural is engaged in activities that are a part of an interstate business and alter the interstate flow of gas, so that it is in accord with the policy of the Natural Gas Act that such a company be subject to regulation as a pipeline company." (23 FPC 531, 535.)

Substituting Lo-Vaca and El Paso for Oklahoma Natural and Consolidated, the pertinent portions of the above-

quoted portions of that decision may be read to support similar conclusions as to the Lo-Vaca sale and El Paso's operations. As in *Oklahoma Natural,* the conclusion is clearly warranted that:

"Interstate commerce has taken place here because [Lo-Vaca] . . . has delivered gas which is transported outside the state and consumed outside it." (23 F.P.C. 291, 293.)

As in *Oklahoma Natural* also:

"This gas has entered the stream of interstate commerce, and has passed across the state border . . . [and] at least some portion of the gas . . . is resold to consumers outside the state of Texas . . . [where] by means of a contractual provision . . . [El Paso] is attempting to substitute . . . [Lo-Vaca's] gas for its interstate gas from Texas [and New Mexico] in making [a similar quantity available for increasing] its . . . [California] deliveries." (23 F.P.C. 291, 293.)

Likewise as in *Oklahoma Natural*:

"Injecting [Lo-Vaca's Texas] produced gas into . . . [El Paso's] system even with a contract that an equal amount of gas would always be . . . [used for compressor station fuel outside Texas] does not alter the interstate nature of . . . [El Paso's] operations and [Lo-Vaca's] . . . sale." (23 F.P.C. 531, 534.)

Thus, as in *Oklahoma Natural,* it is concluded that:

". . . our jurisdiction . . . [is based] on . . . [Lo-Vaca's transportation and sale] being in interstate commerce as a part of the transaction essentially interstate with interstate consequences." (23 F.P.C. 531, 534.)

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And, finally, as in *Oklahoma Natural*:

> ". . . [Lo-Vaca's] sale to . . . [El Paso] is a sale for resale in interstate commerce . . . [Lo-Vaca] is a pipeline company as well as a producer, . . . Therefore . . . [Lo-Vaca] is a 'natural-gas' company as a pipeline company, . . . but in any case . . . [Lo-Vaca] is engaged in activities that are a part of an interstate business and alter the flow of gas, so that it is in accord with the policy of the Natural Gas Act that such a company be subject to regulation as a pipeline company." (23 F.P.C. 531, 535.)

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As pointed out, *supra*, in footnote 14, the *Oklahoma Natural* decision distinguished a number of the other cases cited and relied upon by Lo-Vaca and El Paso, and it should be noted that the subsequent *Shell* case not only reaffirmed and to some extent expanded the separability doctrine of the *North Dakota* case, but also reaffirmed and distinguished the *Oklahoma Natural* case, as follows:

> "Nor are we able to find in any other facts concerning the Shell sale and the Columbian-El Paso exchange, or in the contractual provisions governing these transactions, any factors sufficient to convert what is nominally an intrastate sale of gas for the Seminole plant into an interstate sale . . . the sale of gas for the Seminole plant, although made under the May 20, 1948 contract governing the Shell sale, has no such immediate or substantial relationship to the Shell sale or to the Columbian-El Paso exchange as to justify finding it 'part of the interstate course of business,' in the language of the *Oklahoma Natural* case. Likewise, we are unable to determine that the interrelated transactions involved herein constitute a 'contractual de-

vice,' in the language of the *Oklahoma Natural* case, that might defeat Commission jurisdiction. Neither can we discern in the provisions of the contracts involved herein, or in the purpose or effect thereof, any justification for finding the sale of gas for the Seminole plant a sale in interstate commerce for resale subject to Commission jurisdiction."

Thus without undertaking to discuss herein the many cases pro and con cited and relied upon by the parties—all of which have been read and considered—it is concluded that the *North Dakota* case, as expanded by interpretation in the *Shell* case, is controlling as to the intrastate nature of Houston's contract, and Houston thereby is not subject to jurisdiction; and that the *Oklahoma Natural* case, as distinguished from the *North Dakota* case both therein and in the *Shell* case, is controlling as to Lo-Vaca's becoming a participant in an "interstate course of business," and, despite a "contractual device," thereby becoming subject to jurisdiction.

The instant situations are so parallel, both in their "crucial facts" and in their purposes and effects, to these controlling cases, respectively, that any separate discussion of other cases herein would constitute a work of supererogation.

G. Formal Findings and Conclusions

Upon consideration of the entire record in this proceeding, including the pleadings and briefs, and, in addition to the findings hereinbefore stated, it is further found and concluded that:

(1) El Paso Natural Gas Company is engaged in the transportation of natural gas in interstate commerce

and in the sale in interstate commerce of natural gas for resale for ultimate public consumption, and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) The sale and delivery of natural gas by Lo-Vaca Gathering Company to El Paso Natural Gas Company for fuel consumption outside of Texas, as hereinabove described, and as more fully described in the record and in the application, will result in Lo-Vaca being engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and Lo-Vaca thereby will become a pipeline company and a natural gas company within the meaning of the Natural Gas Act.

(3) The natural gas facilities proposed to be constructed and operated by El Paso, Supply, and Lo-Vaca, as hereinbefore described, are to be used in the transportation and sale of natural gas in interstate commerce, and hence subject to the jurisdiction of the Commission, and to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(4) The sale and delivery of natural gas by Houston Pipe Line Company, as hereinbefore described in the record and in Houston's Petition for Declaratory Order, will *not* result in Houston's being engaged in the transportation of natural gas in interstate commerce or in the sale in interstate commerce of such gas for resale, and Houston will *not* thereby become a natural gas company within the meaning of the Natural Gas Act.

(5) The natural gas facilities proposed to be constructed and operated by Houston, as hereinbefore described,

are to be used only in the transportation and sale of natural gas in *intrastate* commerce, and hence *not* subject to the jurisdiction of the Commission under the Natural Gas Act.

H. The Order

Wherefore, It Is Ordered, subject to review by the Commission pursuant to its Rules of Practice and Procedure, that:

(A) Lo-Vaca Gathering Company's application for authority to carry out, without obtaining an appropriate certificate of convenience and necessity therefor, its proposed restricted-use contract of March 15, 1960, for the sale and delivery of natural gas to El Paso Natural Gas Company, be and it hereby is denied.

(B) Houston Pipe Line Company's petition for a declaratory order be, and it hereby is, granted and it hereby is held, declared and ordered that Houston's proposed restricted-use contract for the sale and delivery of natural gas to El Paso Natural Gas Company, and its proposed construction and operation of natural gas facilities incidental to the said proposed sale and delivery, will not be subject to the Natural Gas Act.

Robert E. Freer
Robert E. Freer

Presiding Examiner

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matters of

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

Exceptions of People of the State of California and Public Utilities Commission of the State of California to the Presiding Examiner's Decision

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Dated: August 29, 1961.

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TABLE OF AUTHORITIES

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matters of

Docket No. CI60-693
LO-VACA GATHERING COMPANY

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Exceptions of the People of the State of California and the Public Utilities Commission of the State of California to the Presiding Examiner's Decision

The People of the State of California and the Public Utilities Commission of the State of California hereby

take the following exceptions to the Presiding Examiner's decision herein in accordance with Section 1.31 of the Rules of Practice and Procedure.

Exception No. I

California excepts to the decision for the reason that it does not contain a specific finding that some of the Houston gas purportedly sold for use in El Paso's compressor and fuel facilities located within the State of Texas will in fact be transported from points within Texas to points outside Texas and sold for ultimate public consumption. California proposes that the following finding be numbered (4) and inserted in that position on page 25 of the Examiner's decision:

> "We find that a portion of the natural gas to be sold and delivered by Houston Pipe Line Company will be transported from points in the State of Texas to points outside said State and resold for ultimate public consumption."

California submits that the following reasons support its proposed finding:

1. The parties agree to the finding here proposed.

At pages 6 and 7 of his decision the Examiner observes that:

> ". . . there is general agreement among the parties and the witnesses that some part of the gas proposed to be sold and delivered for fuel consumption in Texas[5] as well as a part of that proposed to be sold and delivered by Lo-Vaca for fuel consumption outside of

[5] El Paso's Reply Brief, p. 2, for example, states: 'El Paso's argument . . . assumes that some of the molecules of the Houston gas will pass outside of Texas.' (Cf. Tr. pp. 332, 343-44.)"

> Texas, inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California, . . .

In view of this specific finding that the parties agree that some of the Houston gas will be transported out of Texas and resold, it was error for the Examiner not to make the finding here requested. Certainly if the parties are in agreement on an issue, there is no cause for failure to find in accordance with this agreement.

2. The finding is well supported by the record, and is indeed the only finding on the issue which can permissibly be drawn from the evidence.

In this regard we respectfully request the Commission to review the portions of California's brief under the heading "STATEMENT OF THE CASE" entitled "Physical Arrangements", "Integration of Facilities", and "Conclusions" for a full discussion of this issue. California desires to point out that this is the issue as to which its contention, deemed irrelevant by the Examiner in footnote 10, page 16 of his decision, is material.

Exception No. II

California excepts to the decision for the reason that it does not contain a specific finding that the portion of Houston gas which will actually be used by El Paso within the State of Texas cannot be determined. California proposes that the following finding be numbered (5) and inserted in that position on page 25 of the Examiner's decision:

> "We find that the portion of the natural gas to be delivered and sold by Houston Pipe Line Company

which will be used by El Paso wholly within the State of Texas cannot be determined."

The record is devoid of even the slightest evidence by which such portion can be determined. Indeed, because of commingling with other supplies and the practicalities of pipeline operation, all as more fully discussed at pages 6-11

of California's brief, it appears unlikely that a meaningful and useful determination can ever be reached. It goes without saying that mere assertion, as by contract, that a certain portion will be so used is irrelevant to a determination of the portion actually to be so used, absent the necessary physical arrangements for effectuation. Accordingly, the Examiner erred insofar as he failed to make this finding.

Exception No. III

California excepts to the decision for the reason that it does not contain a conclusion that the fact that the portion of Houston gas to be used by El Paso within the State of Texas is indeterminable requires that such portion be treated the same as the portion which will be transported and resold outside Texas for ultimate public consumption. California proposes that the following conclusion be numbered (6) and inserted in that position on page 25 of the Examiner's decision:

"We conclude that, the portion of the natural gas to be sold and delivered by Houston Pipe Line Company for use by El Paso wholly within the State of Texas being indeterminable, the Natural Gas Act requires that said portion be considered as being transported from points in the State of Texas to points outside said State and resold for ultimate public consumption."

In this connection, the Commission's attention is invited to the discussion at pages 18-20 and 23-31 of California's brief, where the issue is thoroughly considered.

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Exception No. IV

California excepts to the decision for the reason that it does not contain a conclusion that the whole of the Houston gas will be transported and sold for resale in interstate commerce and that Houston will become a natural gas company within the meaning of the Natural Gas Act. California proposes that the following conclusion be numbered (7) and inserted in that position on page 25 of the Examiner's decision:

> "We conclude that the natural gas to be sold and delivered by Houston Pipe Line Company will be transported and sold in interstate commerce for resale for ultimate public consumption, that the provisions of the Natural Gas Act will apply to the transportation and sale, and that Houston will become a natural gas company within the meaning of said Act."

These conclusions follow directly from Sections 1(b), 2(6) and (7) of the Act and the findings and conclusions proposed by California herein. California's brief, pages 18-20 and 24-29, analyzes the relevant cases.

Exception No. V

California excepts to the following findings and conclusions and takes the position that the same must be deleted:

> "(4) The . . . delivery of natural gas by Houston Pipe Line Company, as hereinbefore described in the record and in Houston's Petition for Declaratory Order, will *not* result in Houston's being engaged

in the transportation of natural gas in interstate commerce . . . and Houston will *not* thereby become a natural gas company within the meaning of the Natural Gas Act.

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"(5) The natural gas facilities proposed to be constructed and operated by Houston, as hereinbefore described, are to be used only in the transportation and sale of natural gas in *intrastate* commerce, and hence *not* subject to the jurisdiction of the Commission under the Natural Gas Act."

California submits that the following reasons support its position:

1. The contractual restriction of Houston gas to use wholly in intrastate commerce is inoperative to defeat the Commission's jurisdiction.

a. Insofar as contracts are expressions of *intention*, such intention cannot override the physical fact of interstate transportation and sale.

The issue was raised in the *Deep South* case (*Deep South Oil Co.*, 14 FPC 83 [1955]), one of the first important producer-jurisdiction cases to arise after the *Phillips* decision (*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 [1954]). In disposing of the producers' contention that they did not intend to sell in interstate commerce, the Commission said:

". . . where upon investigation it is found that the sales and movement in question are generally in interstate commerce . . . *the facts and not intent are conclusive.*" (at 87)

The Commission concluded it had jurisdiction, and such was affirmed on appeal on the basis of the physical

movement of the gas, regardless of intent. *Deep South Oil Company* v. *F.P.C.*, 247 F. 2d 882, 887-8 (5th Cir. 1957).

California discusses this issue in its brief at pages 24 and 25, and that exposition shows that a contractual intention to restrict the gas against interstate commerce is ineffective in the face of the physical facts. This was also the holding of *J. M. Huber Corp.* v. *F.P.C.*, 236 F. 2d 550 (3d Cir., 1956), to which the Commission's attention is invited.

b. Insofar as contracts are expressions of *agreement*, such agreement cannot override the physical fact of interstate transportation and sale.

California's brief, pages 29 and 30, discusses the latest Supreme Court decision dealing with the problem, *United States* v. *Public Utilities Commission*, 345 U.S. 295 (1953). In suggesting the criteria by which a contractual restriction forbidding resale might be given effect and the sale determined not to be a "sale . . . for resale" within the meaning of the Federal Power Act, the Court was careful to distinguish between the "sale . . . for resale" concept and the "interstate commerce" concept (at 317).

The distinction is important. The term "sale" is one of ordinary commercial usage. It implies *an agreement* between a buyer and a seller.

The term "interstate commerce", on the other hand, carries *no* connotation of agreement or contract. There may be interstate commerce *regardless* of contract. Contracts or agreements are completely irrelevant to

the question of whether or not there is interstate commerce. The issue is solely one of physical fact. As the Supreme Court in the *Connecticut Light & Power* case said, speaking of the corresponding Federal Power Act:

> "This bill came before Congress . . . couched in . . . technical language . . . Federal jurisdiction was to follow the flow . . ." (*Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 529 [1945]).

Contracts or agreements obviously cannot change that flow, nor subtract one whit from the resulting federal jurisdiction.

c. Later court and Commission decisions have not eroded the distinction between the effect of contractual restrictions on "sales . . . for resale" and on "interstate commerce" enunciated by *United States* v. *Public Utilities Commission*, but, on the contrary, support that distinction.

The latest Supreme Court decision concerning the Commission's jurisdiction, the *Transco* decision

(*F.P.C.* v. *Transcontinental Gas P. L. Corp.*, 365 U.S. 1 [1961]), sets forth the guiding principles. Those principles are carefully analyzed at pages 14 and 15 of California's brief, and three considerations or criteria are developed for the allocation of power between nation and state. California suggests in the brief that application of these criteria determines jurisdiction; that thereafter, it is merely a matter of semantics as to which statutory label to apply to the conclusion (at 22).

California's brief, at pages 20-22 and 30, thoroughly considers the case principally relied upon by Houston,

North Dakota v. *F.P.C.*, 247 F. 2d 173 (8th Cir. 1957). California concludes in the brief that the Court in the *North Dakota* case properly determined jurisdiction under the *Transco* criteria. Only the Court's semantics were faulty. Had the Court applied the label "local distribution" to that transaction, its decision would be prefectly in accord with *United States* v. *Public Utilities Commission* and the proposition that contractual restrictions against interstate commerce are ineffective to allay federal jurisdiction.

This analysis of the *North Dakota* case indicates that the only relevant statutory limitation on the "interstate commerce" basis for Commission jurisdiction

is that of "local distribution". When the policies behind that limitation are not present, the transaction is jurisdictional.

California carefully reviews at pages 15-17 of its brief the effect of allowing the contractual restriction of Houston gas to defeat the Commission's jurisdiction, and there demonstrates that the policies behind the "local distribution" exemption are inapplicable to the present facts. A review of that discussion reveals the great contrast between the appropriateness of local regulation in the *North Dakota* case and the inappropriateness of local regulation in the present case. In this respect, the facts of the Commission's recent decision, *Shell Oil Co.*, Dkt. No. G-5029 (June 30, 1961), upon which the Examiner relied, much more resemble the *North Dakota* facts than those of the present case. California invites the Commission's attention to pages 15-18 of its brief, wherein these matters are more thoroughly considered and applied to the facts of the Houston sale.

2. The contractual restriction of Houston gas to use wholly in intrastate commerce is invalid as contrary to the public interest in view of the substantial adverse effects should the restriction be recognized.

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a. The Commission would lose control over a substantial segment of field prices and contract terms which it presently regulates.

Under the *Transco* decision, the Commission was affirmed, in the exercise of its certificating power over pipeline facilities, with respect to its attempt to control area prices and price increases adversely affecting the public convenience and necessity. Establishment of a policy of recognition of such a restriction as Houston proposes here will remove the basis for Commission jurisdiction in *Transco*—the transportation in interstate commerce basis. This will substantially dilute the power the Commission presently exercises over field prices and contract terms.

This is a serious matter. Some indication of its adverse impact can be gleened from the present record. California's brief, page 5, mentions two of the unsatisfactory terms of the Houston transaction; a study of the Houston contract reveals many others. The existence of such terms should not be surprising in view of Houston's stated purpose of avoiding FPC jurisdiction.

b. Needless duplications, rejugglings and other uneconomical expenditures on the part of the interstate

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pipelines would be encouraged.

New constructions would be directed with an eye to restriction as an inducement to attachment of large

reserves, rather than with an eye to most economical location and efficient operation. Indeed, it is not inconceivable that the primary motivation behind many new construction projects would become the provision of intrastate uses for "restricted" gas, rather than the provision of new facilities in order to supply the market. Other diseconomies would result from the needless changeover of old facilities to utilization of "restricted" gas, regardless of the expense and operating cost increases thereby resulting.

This is not mere idle spectulation. The record shows that many of these diseconomies may be present in this very case. Calinfornia's brief, page 11, explores some of the possibilities in this regard. Clearly it was error for the Examiner to fail to regard the interstate commerce restriction as contrary to the public convenience and necessity and as a matter of law invalid and not entitled to recognition in the determination of jurisdiction.

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Exception No. VI

California excepts to the following findings and conclusions and takes the position that same must be deleted:

"(4) The sale . . . of natural gas by Houston Pipe Line Company, as hereinbefore described in the record and in Houston's Petition for Declaratory Order, will *not* result in Houston's being engaged . . . in the sale in interstate commerce of such gas for resale, and Houston will *not* thereby become a natural gas company within the meaning of the Natural Gas Act."

California submits that the following reasons support its position:

1. The contractual restriction of Houston gas to use wholly by El Paso is inoperative to defeat the Commission's jurisdiction:

a. The Examiner so held with respect to Lo-Vaca gas, also contractually restricted against resale.

The Examiner's finding and conclusion number (2) deals with the corresponding "sale-not-for-resale" restriction contained in the Lo-Vaca contract. In the face of this restriction, the Examiner nevertheless held that the Lo-Vaca sale was jurisdictional. His findings and conclusions number (4), quoted above, by giving effect to the analogous restriction in the Houston contract, are clearly inconsistent with his Lo-Vaca holding.

b. The law requires that such restrictions be ignored on the facts of the instant case.

Application of the *Transco* principles discussed under Exception V and in California's brief, pages 15-17, to the instant facts results in denial of any jurisdictional effect to the "sale-not-for-resale" restriction. After all from a practical standpoint, the *Transco* considerations being nothing more than this, the price of gas sold to an interstate pipeline for compressor use is ultimately borne by the consumers of transported gas, just as those consumers bear the purchase price of the gas they use themselves. The only difference, as California points out in its brief, page 16, is that one expense shows up in Account 854 and the other in Account 803. The principle of the noted *Phillips* decision will not permit any jurisdictional significance to attach to this mere accounting distinction.

For it is basic lore that a regulated company's expenses can always be attacked in a rate proceeding as unreasonable. Prior to the *Phillips* decision, this principle dictated that unreasonable pipeline expenditures for compressor fuel gas and for resale gas be disallowed. The *Phillips* decision held that, even so, the difficulties consequent upon application of this

principle to natural gas pipelines require that the price of gas sold to the pipeline itself be regulated. Neither the decision of the Presiding Examiner nor the briefs of Houston, Lo-Vaca and El Paso cite any reason why the Commission should exempt what would otherwise be a jurisdictional transaction under the *Phillips* decision from the protection that decision afforded consumers. We know of none, either.

On the contrary, we, as representatives of the consumers of the state most needing protection in this case, vigorously oppose any weakening of *Phillips* and any subversion of that Supreme Court's mandate. We have quoted in our brief, page 16, an excerpt from the case upon which *Phillips* mainly relied, and believing it so *apropos*, wish to submit it for the Commission's special consideration:

> "Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed." (*Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 693 [1947]).

It supports no distinction in gas purchase accounts such as the parties here contend is of jurisdictional significance.

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c. The cases cited by the parties as being opposed to this principle are, on the contrary, perfectly in accord.

The case of *United States* v. *Public Utilities Commission* was considered in Exception V, with the conclusion that while the case does recognize the possibility of contractually restricted direct sales, the *Transco* considerations limit such recognition to only those situations in which it is possible for a state to be uniquely effective in securing against exploitation.

The *City of Hastings* case relied upon so heavily by Houston and Lo-Vaca, and discussed at page 30 of California's brief, is just such a situation. In that case, the direct sale from an interstate pipeline to a local distribution system for boiler fuel purposes could be uniquely regulated by the state in which the gas was consumed. Consequently, there was no need for federal jurisdiction.

Other cases which have recognized this principle are the *Pennsylvania Gas* case, California brief, page 29, interpreting the Constitution, and *Panhandle Eastern Pipeline Co.* v. *Public Service Commission*, 332 U.S. 507 (1947), based on the Natural Gas Act. The principle would seem applicable to the direct sale to Consolidated

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Edison in the *Transco* case, as well. No case opposing this principle is known; none are cited by Houston, Lo-Vaca or El Paso.

2. The contractual restriction of Houston gas to use wholly by El Paso is invalid as contrary to the public

interest in view of the substantial adverse effects should the restriction be recognized.

We have already adverted to the fact that absence of federal regulation of the sales price in this case means no regulation, because there is no state which is *unique* in the sense of being able to protect its own consumers while not affecting consumers in other states. Yet, of course, the sales price will ultimately be borne by these consumers, who are largely an interstate market. Thus, recognition by the Commission of direct sale restrictions when consumers in more than one state are involved will open up a very large market to unregulated sales. The jurisdiction the Commission has exercised in the past will be substantially diluted because, to California's knowledge, direct sale restrictions in pipeline supply contracts have not been used until now.

It need not be gainsaid that it is unlikely that such contractually restricted sales will be made at prices as low as the Commission is currently certificating as meeting the public convenience and necessity. Both the Houston and Lo-Vaca prices involved here bear this out (California brief, p. 5). The

Commission's attention is invited to California's previous discussion (Exception V, 2 and brief, pp. 3-5 and 9-14) of the further evils recognition of direct sale restrictions entails.

Conclusion

California requests, for the reasons set forth above and as further explained in its brief, that the foregoing proposed findings and conclusions be made a part of this Commission's decision, and the proposed deletions be made.

It further requests that the order as proposed by the Examiner be revised in accordance with the findings and conclusions proposed here, and in particular that Part (B) of that order be deleted and the following substituted therefor:

> "Houston Pipe Line Company's petition for a declaratory order be, and it hereby is, granted and it hereby is held, declared and ordered that Houston's proposed restricted-use contract for the sale and delivery of natural gas to El Paso Natural Gas Company, and its proposed construction and operation of natural gas facilities incidental to the said proposed sale and delivery, will be subject to the Natural Gas Act."

Respectfully submitted,

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Dated: August 29, 1961.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 348

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

Opinion and Order Determining Jurisdiction

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(Issued October 23, 1961)

SWIDLER, Chairman:

As set forth by the presiding examiner in his decision issued August 11, 1961, these proceedings concern the question whether we would have jurisdiction under the Natural Gas Act over proposed sales of natural gas by Lo-Vaca Gathering Company and by Houston Pipe Line Company to El Paso Natural Gas Company. The proceedings arose by Lo-Vaca's filing on June 1, 1960, CI60-693, of an application for a certificate of public convenience and necessity and the filing by Houston on December 27, 1960, CP61-177, of a petition for a declaratory order under Section 16 of the Natural Gas Act to remove uncertainty as to our jurisdiction over Houston's proposed sale.

The sales in issue here are purportedly designed to provide additional gas supply to be used by El Paso for the operation of its compressors and the gasoline plant of Phillips Petroleum Company in Ector County, Texas. El Paso comprises a large pipeline system which extends from the Permian Basin in New Mexico and Texas by means of two large pipelines through New Mexico and Arizona to the border of California. Recently it acquired an additional pipeline extending from New Mexico to the Pacific Northwest. The greater part of its gas supplies is sold to its California customers at the border of that State.

In another proceeding, Docket No. CP60-101, El Paso Gas Supply Company, a wholly owned subsidiary of El Paso, filed with the Commission an application for a certificate authorizing it to construct a compressor station to be known as the Coquat Station located near the community of Three Rivers in Live Oak County, Texas, and a

30-inch pipeline approximately 227.6 miles in length, extending from the Coquat Station to a point of connection with El Paso's system at its Sonora Plant in Sutton County, Texas. At Coquat, the Supply Company would receive for the account of El Paso the gas proposed to be sold by Lo-Vaca and Houston, all of which, it is stated, would be produced in Texas.

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Lo-Vaca is a Texas corporation of Corpus Christi, Texas, and a wholly owned subsidiary of Coastal States Gas Producing Company, but at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf.[1] There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

> "All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

[1] The level of the rate is not in issue at this stage in the proceedings.

Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

Houston is a Texas corporation of Houston, Texas, and a wholly-owned subsidiary of the Houston Natural Gas Corporation. Since 1925, it has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢[1] plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, "El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all

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located wholly within the State of Texas." El Paso further covenants that it would not take from Houston a

[1] The level of the rate is not in issue at this stage in the proceedings.

quantity of gas in excess of the quantity required for fuel in Texas.

The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

El Paso proposed in Docket No. G-18616, now pending before the Commission, to supply its mainline compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the com-

mingled stream in El Paso's line at the Keystone Compressor Station.

Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6.091 M²cf per day and on a maximum day would exceed the supply by 31.879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is propoesd for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21.373 M²cf per day on an average day and

by 36.549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California.

After the filing of briefs, the examiner issued his decision on August 11, 1961. He found that Lo-Vaca's sale

would be subject to the Commission's jurisdiction but that Houston's sale would not be. With respect to Lo-Vaca, he concluded that the Commission's decision in *Oklahoma Natural Gas Co.*, 23 FPC 291, and order denying rehearing, 23 FPC 531, were controlling. On the other hand he felt that the sale by Houston was controlled by the Commission's recent decision in *Shell Oil Company, et al.*, Docket Nos. G-5029, *et al.*, issued June 30, 1961.

Lo-Vaca, the Public Utilities Commission of California, Southern California Gas Company and Southern Counties Gas Company of California, and our staff filed exceptions to the examiner's decision. Lo-Vaca's citing authorities, argues that its sale to El Paso of gas contractually restricted for consumption in its facilities in New Mexico and Arizona would be a direct sale not subject to this Commission's jurisdiction. It emphasizes that this gas was the subject of a separate contract, that purchases from Lo-Vaca and deliveries to El Paso's facilities were separately metered, and that El Paso would consume as fuel volumes of gas in excess of the volumes received from Lo-Vaca. It contends that the commingling of the restricted use gas with gas intended for resale would not prevent the sale from being nonjurisdictional as a direct sale, although of course, it admits the gas would be transported in interstate commerce. The California Commission and our staff objected to the examiner's failure to find jurisdiction over Houston's sale to El Paso. The California Commission argues that the contractual expressions of intention cannot override the physical fact of interstate transportation and sale. It expresses the fear that if some of the gas purchased by a pipeline could be restricted in the manner herein contemplated, the Commission would lose control over a substantial portion of field prices, and there would result uneconomical expenditures on the part of the pipelines in order to attach reserves

for the intrastate market. It contends further that consumers of the interstate gas would ultimately have to bear any higher price for compressor fuel gas not subject to our regulation.

The staff's position is that Houston's sales and Lo-Vaca's sales would be subject to our jurisdiction and that this cannot be avoided by contractual restrictions on the gas sold. The staff argues that the Houston and Lo-Vaca gas would flow in continuous movement from Texas to markets in other states where it would be resold and the fact that Houston's and Lo-Vaca's gas would be mixed in El Paso's facilities with gas from other sources would have no effect on the jurisdictional status of Houston's and Lo-Vaca's sales. The staff argues further that it is not logical to treat Houston's sales as non-jurisdictional and Lo-Vaca's sales

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as jurisdictional and that we are not authorized to put into the hands of buyers and sellers of gas the power to determine by contract the jurisdictional status of their sales. To do so the staff contends would create a serious regulatory gap. Likewise, among other points the two southern California companies contend that Houston's gas would be mixed with other gas and would flow outside of Texas to California and the sale of this gas would not be removed from our jurisdiction because of a contractual device.

On this record, the briefs, the examiner's decision and the exceptions, the question before us is whether contractual arrangements and the intentions of the parties can segregate Lo-Vaca's and Houston's gas sold to El Pase from other gas received by El Paso regardless of physical commingling, the actual destination of the gas, and the operations of El Paso's system. In our opinion, as dis-

cussed below, such a segregation would not be achieved here and both sales would be subject to our jurisdiction.

The Natural Gas Act as shown in Section 1 (b) applies "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use * * * but shall not apply to any other transportation or sale of natural gas * * *." It is clear enough that physically the specific gas sold by Lo-Vaca and Houston would actually in part be resold to customers outside of Texas and it would be physically impossible to restrict the consumption of this gas to El Paso's facilities either inside or outside the state. It would be contrary to the facts to assume that the restricted gas would go only to the compressor stations, while other gas purchased by El Paso would be sold for resale. Thus, literally, the gas sold by Houston and Lo-Vaca would come within the wording of the statute as sold in interstate commerce for resale.

In reaching this conclusion, we are cognizant of the fact that there exist in the natural gas industry arrangements whereby companies transport natural gas for other companies, commingling it with gas from various sources. Although under some of the transportation arrangements, gas is purchased by the ultimate recipient directly from producers, generally there is no earmarking of specific gas to the ultimate destination. The delivering company is simply obligated to deliver a specified volume. In such a case, the volume of gas purchased may be compared to a "contract demand volume" since there is no earmarking of any volume as delivered from a particular source. It is not our intention by this opinion to disturb such transporation arrangements. What we say in this opinion relates only to what constitutes interstate commerce and our jurisdiction under the Natural Gas Act.

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It is well settled that the business of selling and transporting gas, electric energy and other goods from one state to another constitutes interstate commerce. This is true of a sale of grain in one state which is to be transported by the buyer to another state, *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 55; *Dahnke-Walker Co.* v. *Bondurant* 257 U.S. 282, 290, as well as the auction of tobacco to be transported by the buyers to points outside the state, *Currin* v. *Wallace*, 306 U.S. 1, 10, and the purchase of cattle transported from

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another state, *Swift and Co.* v. *United States*, 196 U.S. 375, 398-399, where Justice Holmes said, "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." Sales of gas by interstate pipeline systems are sales in interstate commerce where the gas sold has been produced in another state even when mixed with gas produced in the same state. *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 306; *P.U.C. of Kansas* v. *Landon*, 249 U.S. 236, 245. When such sales are for resale, they are subject to our jurisdiction. *Panhandle Eastern Pipe Line Co.* v. *Comm'n.*, 332 U.S. 507, 516-517; *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582. In the latter case, the Court said:

> The sale of gas originating in one State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress.

The same conclusion applies to sales of electric energy generated in another state although mixed with energy generated in the state of sale. *Pennsylvania Water and Power. Co.* v. *F.P.C.*, 343 U.S. 414; *Wisconsin-Michigan Power Co.* v. *F.P.C.*, 197 F. 2d 472 (CA 7), certiorari

denied 345 U.S. 934. Sales of electric energy in the state of generation where the energy is to be transmitted out of the state and consumed in another state are also in interstate commerce. *Public Utilities Comm.* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83; *Hartford Electric Light Co.* v. *F.P.C.* 131 F. 2d 953 (CA 2), certiorari denied 319 U.S. 741. In *Jersey Central Co.* v. *F.P.C.*, 319 U.S. 61, 71-72, it was said:

> "If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile."

Of particular relevance to this proceeding, it has been held in many cases that a sale of gas in the producing state where the gas is to be transported and sold for resale in another state is a sale in interstate commerce and subject to our jurisdiction. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682-684; *Interstate Natural Gas Co.* v. *F.P.C.*, 331 U.S. 682, 687-688; *Saturn Oil & Gas Co.* v. *F.P.C.*, 250 F. 2d 61 (CA 10) certiorari denied 355 U.S. 956; *Continental Oil Co.* v. *F.P.C.*, 247 F. 2d 904 (CA 5); *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882 (CA 5),[2] *Shell Oil Co.* v. *F.P.C.*, 247 F. 2d 900, 903 (CA 5), certiorari denied 355 U.S. 930. In the *Phillips* case the Court said (347 U.S. at p. 682):

> • • • we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company.

[2] Certiorari was in effect denied in companion *Shell* case next cited.

In the *Saturn* case, which involved wellhead sales of natural gas to two interstate pipelines by a small unintegrated oil company, the court said:

> "The Phillips decision holds that the Act applies to all wholesale by producers. Saturn may not escape regulation because of its size or because of the restricted nature of its operations."

Deep South is also a small unintegrated producer of oil and gas selling gas to a gatherer and processer which, in turn, sells Deep South's gas, mixed with other gas, to an interstate pipeline. The court said in reply to a contention that the Deep South's sales were made for manufacture not resale (247 F. 2d at p. 888):

> The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently, there can be no question that petitioner is making sales for resale within the meaning of the Act.

We are of the opinion that the principles expressed in these cases are not changed by the contractual provisions with respect to the disposition of the gas here involved. It is the "nature of the beast" not the label that is controlling. It has been held that whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract. *Atl.C.L.R.R.* v. *Standard Oil Co.*, 275 U.S. U.S. 257, 268; *B.&O.S.W.R.R.Co.* v. *Settle*, 260 U.S. 166, 170. With respect to the Federal Power Act which is similar to the Natural Gas Act, the Supreme Court has said, "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or

governmental test." *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 529.

In *Shell Oil Co.* v. *F.P.C. supra,* gas was sold to Phillips which processed it, removed liquefiable hydrocarbons and resold the residue gas to El Paso. In attempting to refute our jurisdiction Shell relied on its contract with Phillips providing that the gas was conveyed to Phillips for the purpose of manufacturing gasoline. The court pointed out that there was actually no restriction on the disposition of the residue, gas, and added (247 F. 2d at p. 903):

> But be this as it may, the legal determination of the question rests not upon the parties' use of the word "manufacture", but upon the actual disposition of the gas.

In addition to the above considerations, the character of sales by Houston and Lo-Vaca is shown, by the nature of El Paso's operations. El Paso is engaged in an enterprise extending from Texas to California and

from Mexico to Canada. The record in this case shows that its gas produced or purchased in Texas goes to a number of possible destinations. Some is consumed in Texas, but most of it is transported out of the state in El Paso's pipeline system to be consumed in pipeline facilities or resold in New Mexico, Arizona or California. The contractual provisions, of course, do not alter these physical facts. Neither is the situation altered by El Paso's proposal to build a 16-inch line west from its Keystone compressor station so that there would be a line wholly in Texas by which fuel could reach its Texas compressor stations, for the Houston gas commingled with other gas in El Paso's main line would physically move

out of Texas although some portion might travel through the proposed 16-inch line.

The way in which El Paso operates its system in transporting its gas from the sources of supply to the points where it is needed as discussed in part above, demonstrates that the system must be considered as a whole and that it has the primary purpose of moving gas from the Permian Basin and other sources to consumers in a number of states. In *El Paso Natural Gas Co.*, 22 FPC 260, 277, 278,[3] we found that El Paso operated as integrated natural gas pipeline system and that it would be discriminatory to determine just what gas goes to each of the several customers. In our opinion the sale of gas to this interstate system, which would be used for system purposes and, at least in part, would leave the state and be sold for resale and consumed outside the state, would be subject to our jurisdiction. The situation may be compared in reverse to our decision in the *Penn Water* case.[4] There we found that sales in Pennsylvania by an integrated electric system were sales in interstate commerce and subject to our jurisdiction, although part of the energy sold had been generated in the same state. The gas to be sold to El Paso by Lo-Vaca and Houston would be isolated only by the terms of the contracts but actually would become system gas along with the gas of other producers who did not receive this constractual treatment.

While the El Paso system provides a good example of an integrated system and this fact supports our conclusion here, we would reach no different result if the sales were

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[3] Remanded on other grounds as *El Paso Natural Gas Co.* v. *F.P.C.*, 281 F. 2d 567, (CA5) certiorari denied 366 U.S. 912.

[4] 8 F.P.C. 1, affirmed as *Pennsylvania Water and Power Co.* v. *F.P.C.*, 343 U.S. 414; see also *Kentucky Natural Gas Corp.*, v. *P.S.C.*, 28 F. Supp. 509 (D.C.E.D. Ky.), aff'd 119 F. 2d 417 (CA6).

to a single line system where physically the gas was mixed with other system gas and was physically transported out-of-state and sold in interstate commerce for resale. In this hypothetical situation, the gas sold would still be transported from one state to another and sold for resale, regardless of attempts by the parties, in their agreements with each other, to isolate and exclude such gas from our jurisdiction. As shown by the cases cited above, the touchstone to the question whether a sale of gas is for resale in interstate commerce is what is done with the gas, not what the parties may say about the transaction, verbally or in writing. Again we may say that the parties are not prevented by our conclusions here from entering into private arrangement with respect to the division of the gas or the ownership of the gas, but these arrangements will not prevent our jurisdiction attaching.[5]

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If we reached a conclusion different from that above, our regulation of gas rates would be handicapped. It would be possible, as in this case, for a pipeline to offer to purchase gas at a higher price than we would otherwise allow in the area upon the assertion that it would use this gas in its compressors or would deliver it to its intrastate customers even though the gas would actually be received into its general system transportation facilities and used for every system purpose. It would be possible for a pipeline to discriminate among producers by giving certain ones the privilege of selling to it the gas which by agreement would be deemed to be segregated from the interstate stream and to be resold and consumed in the state of production or used in compressor stations. This may increase the cost to interstate customers and at the same time put them at a com-

[5] Of course, what effect, if any, such arrangements would have on the issuance of certificates, and allocations and rates is not before us.

petitive disadvantage in obtaining additional supplies of gas. While our jurisdiction is limited by the Natural Gas Act, and not by the wider scope of the Constitution, we may note that the sales contemplated here could not properly be regulated by the producing state. They would be sales that concern "more states than one"[6]; they would concern Texas but also New Mexico, Arizona and California and the distribution of the gas to the public whom the Natural Gas Act was designed to protect.

A number of cases have been cited in the briefs of the various parties in support of their contentions but they do not disturb our conclusions. In *U.S.* v. *Public Utilities Comm'n.*, 345 U.S. 295, we had found that a sale of electric energy by a California company to the Navy at an installation in Nevada was subject to our jurisdiction even though the greater part of the energy was to be consumed by the Navy (and would thus have been exempt from our jurisdiction if it had been a separate transaction) and only a small part was to be resold. The Supreme Court suggested that a separation of the resale and direct sale energy might have been achieved, although that did not show in the record. In this respect the case does not involve an interstate commerce question at all, but a possible segregation between a direct sale and resales. It does not concern the operation of an interstate pipeline, but merely the final consumption and distribution of the electric energy. Moreover, the Commission's jurisdiction was sustained. A similar problem was involved in *City of Hastings* v. *F.P.C.*, 221 F. 2d 31 (CADC), certiorari denied 349 U.S. 920, where the court affirmed us in finding that the direct sale of gas to the city for use in its power plant was not subject to our jurisdiction, although commingled with gas sold to the city for resale, where the direct sale gas had been excluded by

[6] *Gibbons* v. *Ogden* 9 Wheat 1, 194

the terms of the rate schedule applicable to the resale gas. In both these cases the gas or electric energy for the alleged direct sales was to be consumed in the state of sale for local purposes, while Houston's and Lo-Vaca's gas would be sold to a pipeline system to enable it to carry on its interstate business.

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The *North Dakota* case[7] presents the most serious problem of distinction. Whether or not that case was rightly decided is an open question.[8] In that case, we found that we did not have jurisdiction over "firm sales" of gas in North Dakota by certain producers to Montana-Dakota Utilities Company. The gas was produced in North Dakota and by contract was to be used in that state. Montana-Dakota was to use part of this firm gas to serve several communities from its line which extended westward into Montana. It was commingled in this line with "dump" gas sold by the same producer to Montana-Dakota under separate contracts to be used in North Dakota and Montana. All of this gas came from one compressor station and was not mixed with other gas from other North Dakota sources. Thus it was possible to measure the intrastate and interstate volumes attributable to the source.

The *North Dakota* case presents a far more limited situation with a single source of supply within the state than that presented here. As can be seen from the citations set forth earlier in this opinion, it runs counter to the whole stream of the decisions of this Commission as to what constitutes a jurisdictional sale in interstate commerce and to the decisions of the Supreme Court construing this and

[7] *Montana-Dakota Utilities Co., et al.*, 16 FPC 415 affirmed as *North Dakota v. F.P.C.*, 247 F. 2d 173 (CA8).

[8] See *Oklahoma Natural Gas Company*, 23 FPC 291, discussed below, where the Commission also declined to follow the case.

other legislation. To the extent that *North Dakota* may be inconsistent with the action we take here, we believe it was erroneously decided.

In *Oklahoma Natural Gas Company*, 23 FPC 291, 531, we found that a sale by Oklahoma Natural to Consolidated Gas Utilities Corporation where the gas would be delivered into Consolidated's interstate pipeline in Oklahoma would be subject to our jurisdiction even though the companies agreed that an equivalent amount of gas would always be delivered by Consolidated to its customers in Oklahoma. It was, of course, clear that physically some of Oklahoma Natural's gas would be transported in Consolidated's pipeline outside of Oklahoma for resale. We thus held there, as we hold here, that a sale of gas in interstate commerce for resale cannot be transmuted into something else by contractual provisions.

In its exceptions Lo-Vaca contends that the examiner termed it a "pipeline company" in addition to being a "natural gas company". Lo-Vaca proposes to build a system of lines which will receive the gas from the producers, transport it and deliver it at Coquat, but the record is not sufficient to determine here whether it is a "pipeline company" in addition to being a natural gas company and it is not necessary to do so. However, on the basis of such facts as appear in the record, it would appear that both Lo-Vaca and Houston would be pipeline companies.

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The Commission further finds

(1) El Paso is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate commerce of natural gas for resale for ultimate public consumption, and is a pipeline company and a "natural

gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) El Paso Gas Supply Company upon the completion of the facilities proposed in Docket No. CP60-101 and the commencement of the sales proposed herein by Lo-Vaca and Houston would be engaged in the transportation of natural gas in interstate commerce, and would be a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act.

(3) The sale and delivery of natural gas by Lo-Vaca and Houston as hereinabove described, and as further described in the record and in the application, would result in Lo-Vaca and Houston being engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and Lo-Vaca and Houston thereby would become natural gas companies within the meaning of the Natural Gas Act, and their respective sales to El Paso would be subject to our jurisdiction.

(4) The natural gas facilities proposed to be constructed and operated by Lo-Vaca and Houston, are to be used in the transportation and sale of natural gas in interstate commerce, and hence would be subject to the jurisdiction of the Commission and to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

The Commission orders

(A) Lo-Vaca's request that the examiner's decision be modified so as to find it would not be engaged in the sale of gas for resale in interstate commerce is hereby denied.

(B) Houston's petition for a declaratory order that neither it nor the sellers of gas to it would be natural gas companies subject to the Commission's jurisdiction under the Natural Gas Act on account of the proposed transactions described above is hereby denied.

(C) Exceptions not granted herein are hereby denied.

(D) The examiner's decision, as modified and to the extent that it is consistent with our findings and order herein is hereby adopted as the decision of the Commission.

By the Commission. Commissioner O'Connor, dissenting in part, filed a separate statement.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

(SEAL)

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Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

(October 23, 1961)

O'CONNOR, Commissioner, *dissenting in part*:

Since, in my opinion, the Presiding Examiner's decision should be adopted by the Commission as its decision herein, I dissent from the modification thereof.

In modifying the Presiding Examiner's decision, the majority recognizes that its opinion and order are inconsistent with *State of North Dakota, et al.* v. *F.P.C., et al.*, 247 F. 2d 173 (CA8-1957). Their opinion states that:

> "To the extent that the *North Dakota* case may be inconsistent with the action which we take in the instant case, we believe that it was erroneously decided."

The Court of Appeals stated the basis of its *North Dakota* decision as follows (p. 177):

"... As found by the Examiner and approved by the FPC, the gas received . . . at Tioga, North Dakota, is broken into two streams, one of which moves eastward in the Tioga-Minot, North Dakota, intrastate line. Clearly that is and can only be intrastate transportation not subject to FPC control. The other stream moves westward [into Montana-Dakota's integrated system, p. 175] but *before crossing any state line* a small portion of it goes off into the laterals serving the four North Dakota towns of Ray, Wheelock, Epping and Springbrook. The gas going into the Tioga-Minot intrastate line and to the four named North Dakota towns is *bought and paid for under the 'firm gas' contracts.* We think, then, the gas sold pursuant to such 'firm gas' contracts for consumption in North Dakota is clearly distinguishable from the 'dump gas' sold in interstate commerce. There is no commingling of interstate with intrastate gas within the State of North Dakota *in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota.* Accordingly, the *quantities* of intrastate gas purchased by Montana-Dakota under the 'firm gas' contracts are easily identifiable and determinable." (Emphasis supplied.)

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In that case, as in the Presiding Examiner's decision herein, the metering off within the producing state of the contract quantities of intrastate gas before any of the gas stream had crossed a state line was held to be a clearly distinguishable separation despite the commingling thereof in said stream with other locally produced gas destined for interstate transportation and sale.

As to such commingling, the Court said in *North Dakota* (P. 176):

> ". . . The fact that this ['firm'] gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9¢ 'dump gas' interstate contracts does not convert the 16¢ 'firm gas' contracts into interstate contracts."

Obviously, under the physical flow theory applied by the majority herein, some molecules of the 'firm gas' in the stream in the *North Dakota* case flowed into Montana for resale and the 'firm gas' contracts thus could not have been held to be outside our jurisdiction. Hence, the necessity for them to depart herein from the judicial precedent established by the *North Dakota* case. To such a departure, I am opposed.

I agree with the majority that the expense of gas purchased for compressor use by interstate pipeline companies, as well as all other expenses of these companies, should be subject to our review and possible disallowance for rate-making. However, I do not feel that the necessity for such review of these relatively small amounts of gas requirements is sufficient cause for the development of such a broad policy as that enunciated by the majority in this case.

In my opinion, the decision of the majority would effectively preclude the use of interstate pipeline company facilities for intrastate transmission of natural gas within the producer states for the use of the consumers and industries in those states without the producers of such gas being subject to the jurisdiction of the Federal Power Commission. It seems to me this is an unnecessarily harsh imposition on the consumers in the producing states whose resources and statutes have been availed of to permit the construction and operation of these interstate lines. There

may be good and sufficient reasons (not the least of which is the cost of complying with regulatory reporting requirements) for many producers to avoid subjecting themselves to the jurisdiction of the Federal Power Commission.

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It appears to me that the advantages to interstate pipeline companies of the flexibility in disposing of surplus supplies of gas in intrastate commerce, as well as the potential usefulness of these lines in providing intrastate transportation revenues, far outweigh the possibilities of additional costs to interstate consumers.

L. J. O'Connor, Jr., *Commissioner*

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

Docket No. CI60-693
Lo-Vaca Gathering Company

Docket No. CP61-177
Houston Pipe Line Company

Application of Houston Pipe Line Company for Rehearing

Introduction

Pursuant to Section 19(a) of the Natural Gas Act (Act of June 21, 1938, 52 Stat. 821, as amended), 15 U.S.C. 717r(a) and to Section 1.34 of the Commission's Rules of Practice and Procedure, 18 CFR Section 1.34, Houston Pipe Line Company (Houston) hereby petitions the Commission to modify without further hearing the opinion and order determining the jurisdiction issued herein on October 23, 1961 in the manner and to the extent hereinafter set forth.

Specification of Errors

Houston respectfully submits that in and by the aforesaid opinion and order determining jurisdiction (Opinion No. 348), the Commission erred in each and all of the following respects:

1. The Commission's action is arbitrary and not in accord with the law.

2. The Commission's action is arbitrary and not in accord with the uncontroverted evidence of record.

3. The Commission in issuance of the order accompanying Opinion No. 348 has exceeded its jurisdiction.

GROUNDS FOR REHEARING

A. The Commission's Action is Arbitrary and Not in Accord With the Law.

The Commission in its Opinion No. 348 issued October 23, 1961 in the above-captioned proceedings determined that its jurisdiction attaches under the Natural Gas Act (Act) for the proposed sales of natural gas by Lo-Vaca Gathering Company (Lo-Vaca) and Houston to El Paso Natural Gas Company (El Paso) in stated consideration by the Commission of "physical commingling, the actual destination of the gas, and the operations of El Paso's system." This conclusion by the Commission was reached despite the contractual arrangements, operational ability and intention of the parties to segregate such volumes from a stream in interstate commerce.

1. *The Commission erred in construing Sections 1(b) and 2(7) of the Act as it applies to Houston*

The Commission in its Opinion No. 348 states that such opinion "relates only to what constitutes interstate com-

merce and our jurisdiction under the Natural Gas Act." (Mimeo, p. 5). Its determination in this respect, however, to the effect that jurisdiction attaches to the proposed sale by Houston to El Paso must be considered to be exclusively grounded upon and limited to the exercise of the jurisdiction conferred upon it under the Act and specifically Sections 1(b) and 2(7) thereof. Section 1(b) of the Act provides in part:

"(b) The provisions of this Act shall apply to the *transportation* of natural gas in *interstate commerce*, to the sale in interstate commerce of natural gas *for resale* for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation* or sale . . ." (Emphasis Added)

Section 2(7) of the Act provides in part:

"(7) 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof. . . ."

The basis for the Commission's determination of jurisdiction turns entirely on the following conclusion: (Mimeo. p. 5):

". . . It is clear enough that physically the specific gas sold by . . . Houston would actually in part be resold to customers outside of Texas and it would be physically impossible to restrict the consumption of this gas to El Paso's facilities either inside or outside the state . . . Thus, literally, the gas sold by Houston . . . would come within the meaning of the statute as sold in interstate commerce for resale."

(1119)

Houston respectfully submits this legal conclusion is erroneous within the meaning and intent of the statute. The fact of physically commingling of the intrastate gas volumes with gas volumes eventually destined for interstate deliveries does not thereby transform the entire composite volume being transported to an exclusively interstate character prior to transmission out of the state of production and purchase. *Peoples Natural Gas Company* v. *The Public Service Commission of Pennsylvania*, 270 U.S. 550.

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In the *Peoples* case, the company produced its own gas in Pennsylvania which was commingled with gas produced in West Virginia and purchased by Peoples at the state border. The commingled stream was distributed by Peoples in Pennsylvania. At page 555, the Supreme Court said:

> "As respects the Pennsylvania gas, we think it must be held to be in intrastate commerce only. Feeding it into the same pipelines with the West Virginia gas works no change in this regard. Of course after the commingling the two are indistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other."

The Supreme Court accordingly held that the gas produced and distributed in Pennsylvania, although commingled, were transactions in intrastate not interstate commerce. Here, applying this test, the proportions of the proposed sale by Houston with the purchase volumes by El Paso from other sources within the State of Texas are definitely known through metering, as in the *Peoples* case, although commingled. The sales volumes of Houston may be readily

determined and are proposed to be entirely withdrawn in Texas from the commingled stream without in any way affecting the transportation or sale of other gas volumes purchased by El Paso from others.

Section 1(b) of the Act provides that a direct sale for consumptive use by the purchaser is not a sale for resale over which the Commission has jurisdiction, nor does the Commission have jurisdiction over the transportation of natural gas when it is consumed by the

purchaser in the same state in which it is produced. The specific provision of that Section of the Act providing that jurisdiction shall not attach to any sale other than those therein enumerated have been held to plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption, for domestic, commerical, industrial or any other use. Direct sales for consumptive use of whatever sort were excluded." Cf. *City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F. 2d 31, *cert.* denied 349 U.S. 920.

Moreover, the definition of interstate commerce as contained in Section 2 of the Act is clear and unambiguous. The fact that physical commingling of intrastate and interstate gas in the state of production renders it impossible to ascertain with complete certainty that some molecules of the intrastate gas may be transported from one state to another is not determinative. It clearly does not constitute "commerce between any point in a state and any point outside thereof," for no loss of identity of the intrastate gas occurs. Cf. *State of North Dakota, et al.* v. *FPC, et al.*, 247 F. 2d 173; dissent in Opinion No. 348.

2. The Commission erred in construing the established case law.

Houston respectfully submits that the analysis of the majority in Opinion No. 348 with respect to cited decisions related to interstate commerce matters is not well taken here. The cases therein relied upon in each instance involve considerations of interstate commerce from the aspect of unrestricted commercial intercourse between peoples in different states. Here it is undisputed that the evidence establishes the following:

(a) The gas purchase agreement of July 19, 1960 between Houston and El Paso provides for the delivery of 70,000 Mcf on an average day and further provides that such gas to be purchased by El Paso "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plants of Phillips Petroleum Company in Ector County, all located within the State of Texas," and additionally provides that El Paso "would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas." (Opinion No. 348, Mimeo. pp. 2, 3).

(b) The facilities in Texas which would be fueled with Houston's delivery volume are such as to require volumes of fuel gas in excess of that to be supplied by Houston on both an average day and a maximum day. (Opinion No. 348, Mimeo. p. 3).

The correct state of the law governing in these circumstances is that which the majority cited and sought to distinguish in *Montana-Dakota Utilities Co., et al.*, 16 FPC 415, affirmed as *North Dakota* v. *FPC*, 247 F. 2d 173. Here as in *North Dakota*, "there is no commingling of interstate with intrastate gas . . . in the sense of loss of identity be-

cause the intrastate gas is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State . . . Accordingly, the quantities of intrastate gas purchased . . . are easily identifiable and determinable."

B. The Commission's action is arbitrary and not in accord with the evidence of record

As cited heretofore, *supra*, p. , the Commission's opinion as to the jurisdictional status of the Houston-El Paso proposal seems

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to rest on the evidentiary conclusion that:

> "It is clear enough that *physically* the *specific* gas sold by . . . Houston would actually in part be resold to customers outside of Texas and it would be *physically* impossible to restrict the consumption of this gas to El Paso's facilities either inside or outside the state."

Houston submits that the "physical" test of "specific" gas molecules is legally misplaced, as has been demonstrated by the applicable law discussed in the foregoing part. Equally significant, the Commission's conclusion is not consistent with the facts established by the evidence.

1. *The evidence of record does not support the proposition that all restricted use volumes would not be consumed in the state in which purchased*

The evidence, pertinent to decision of the jurisdictional question, produced at the hearings may be briefly summarized as follows. All of this restricted use gas is produced in Texas (R. 128, 26). It will be commingled in El Paso's line after accurate metering thereof at the point of

delivery, transported to Sonora and further thereafter transported through existing and proposed facilities commingled with other Texas produced gas (R. 114, 118, 122). El Paso will at all times utilize from the common stream an amount for fuel for its plants in Texas and for the Phillips plant in Texas in excess of the amount purchased and received from Houston (R. 128, 343). Fuel uses at all of such plants will be separately metered (R. 125, 126, 128, 181, 328, 343). This is the only way to determine the fuel uses as, following commingling, one cannot either prove or disprove that a particular molecue of gas was so employed or remained in the commingled stream (R. 344). It should

be recalled, parenthetically, that metering is the accepted and standard method for determing non-jurisdictional pipeline sales effected from the common stream. The existing and proposed pipelines of El Paso which will be utilized to transport the Houston gas to points of ultimate consumption thereof at plants wholly within the State of Texas as well as the locations of those plants and the Phillips plant all within the State of Texas are graphically portrayed in Exhibit 6. Not all of El Paso's existing plants in Texas will be so employed and such other plants could, if necessary, consume portions of the Houston gas as fuel (R. 138, Exh. 6). It is thus apparent that through existing and proposed facilities Houston's Texas produced gas may be transported wholly within Texas in a continuous flow downstream from the delivery point and delivered to designated existing and proposed plants, all within the State of Texas, without any of the commingled stream of only Texas produced gas ever leaving the State of Texas or having injected therein any gas produced in any state other than Texas (Exhibit 6, R. 139, 140). The specific existing and proposed plants of El Paso in Texas in which Houston gas

will be consumed as fuel are identified (Exhibits 7 and 8, R. 141). The actual fuel requirements of such plants and the estimated fuel requirements of the proposed plants on both an average and a peak day appear on the flow diagrams, Exhibits 7 and 8. The directions of the flow on each of such days is shown by the red arrows, particularly identifying the flow of the Houston restricted use gas. It is evident therefrom that the Houston gas will flow only in Texas (Exhibits 7 and 8, R. 145-147). It thus conclusively appears that on both the average and peak day the fuel requirements of the specified plants exceed by wide margins the volumes of gas

to be purchased by El Paso for such use from Houston (Exhibits 7 and 8, R. 149-150). It thus appears that through existing and proposed facilities El Paso can and will perform its contract obligations with Houston (R. 148). El Paso can and will so perform even on a minimum day. No exhibit was submitted respecting minimum day fuel requirements of these plants or a flow diagram applicable to such a day because of the difficulty of accurately determining a minimum day because of the possibility of equipment failure (R. 341). At all times, however, even on a minimum day, the Houston restricted use gas will be used only for fuel in the specified plants strictly in accordance with the respective contract provisions (R. 158). El Paso at all times and even on a minimum day can and will regulate its takes from Houston to assure that it takes from neither any greater quantities than it will burn as fuel in the plants at which it will consume the respective gases. Only such quantities and no more will ever be taken. El Paso has the means to assure this and be on the safe side (R. 356). The aforesaid flow diagrams were augmented by flow diagrams showing El Paso's Southern system

design capacity and its Permian field design capacity (Exhibits 9 and 10). Detailed engineering design data are shown to demonstrate, after operation of this project, the capacities of the two systems to accept deliveries of the restricted use gas of Houston, to transport it as contractually required, to deliver it to the specified plants at which it will be consumed as fuel, and otherwise to perform El Paso's contractual obligations (R. 159). El Paso will do whatever is required to perform its contract obligations (R. 266-267; 272, 307). Separate meters will be employed to accurately measure the quantities received by El Paso from Houston (R. 25, 343). Separate

meters will record the receipt of other Texas produced gas entering the gas stream and separate meters will record the deliveries to the plants at which the restricted use gas of Houston will be consumed as fuel (R. 343). Such metering is the only method by which direct sales for non-jurisdictional fuel consumption uses may be established. It is not possible to demonstrate on a molecular basis that particular molecules attributable to identified vendors were or were not so employed (R. 332, 343).

2. *Rearrangement of Station Piping.*

The Commission's order in Opinion No. 348 relies in large measure, seemingly, on the following conclusion (Op. 348, Mimeo. p. 3):

> "To give some semblance of physical delivery of Houston's gas to the existing stations, [in Texas], El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals . . . since the plants are already supplied with

fuel, these new facilities are obviously unnecessary."[1] (Insert added).

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The true state of the record establishes the following:

In a few relatively minor and insignificant instances, proposed fuel lines will constitute duplicates of existing facilities (R. 354). Proposed construction of such duplicate facilities to accomplish the contractual obligations respecting restricted use for fuel is not relevant to the jurisdictional issue here presented. Moreover, duplication of facilities has been repeatedly held to be contrary to the public interest. Like the tendered cost evidence of the PUC of California and the Southern California Companies, properly excluded by the Presiding Examiner, the propriety of the construction of duplicating facilities should be an issue only in a later hearing. This record shows, additionally, that other existing plants in Texas could be specified. Duplicating of fuel lines might thus be avoided. Most importantly, when this project becomes operative, the quantities of gas now being consumed as fuel in existing plants and stations of El Paso will become available to the system and to the customers served thereby. There will be no cut back (R. 370). The necessary effect is an increase in system capacity in large amounts and access to the prolific reserves of South Texas. Title to the gases proposed to be delivered under each of these restricted use contracts passes to El Paso at the delivery point near Three Rivers, Texas, by the express provisions of each of the contracts. Houston in its contract warrants its title to and ownership of the gas prior to delivery thereof to

[1] At the outset it must be acknowledged that if adequacy of existing pipeline facilities to provide currently rendered service were to serve as the criteria for certificate determinations regarding future system expansions, the industry would perforce be required to remain static and Section 7(e) would be written out of the Act.

El Paso free of liens or incumbrances and further warrants its right to sell the gas to El Paso.

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C. The Commission Has Exceeded Its Jurisdiction.

1. *The Commission is bound by judicial precedent.*

The Commission's orders are subject to review and modification by United States Courts of Appeals, Section 19 of the Act. Similarly, the Commission is bound to adhere to the law as defined by such courts. It follows therefore that the Commission is not empowered to overthrow the law as thus declared. To do so as the Commission does here in its disposition of *North Dakota* v. *FPC*, 247 F.2d 173 (Mimeo. p. 10) is error of law and subject to correction. *U.S. ex rel. Rongetti* v. *Neely*, 207 F.2d 281 (1953).

D. Conclusion

Wherefore, by reason of the foregoing, Houston Pipe Line Company prays that the Federal Power Commission modify its opinion No. 348 and amend its order issued therewith by a disclaimer of jurisdiction over the proposal presented in Docket No. CP61-177.

Respectfully submitted,

Houston Pipe Line Company
By Jefferson D. Giller
Fulbright, Crooker, Freeman,
Bates & Jaworski
Bank of the Southwest Bldg.
Houston 2, Texas
Its Attorneys

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of

Docket No. CI60-693

LO-VACA GATHERING COMPANY

Docket No. CP60-177

HOUSTON PIPE LINE COMPANY

Application of El Paso Natural Gas Company for Rehearing

El Paso Natural Gas Company (El Paso), an aggrieved party in the above-captioned proceedings by reason of the issuance on October 23, 1961 by the Commission of Opinion No. 348 and accompanying order entitled, "Opinion and Order Determining Jurisdiction", hereby petitions the Commission pursuant to Section 19(a) of the Natural Gas Act, as amended, 52 Stat. 821, 15 U.S.C. 717r(a) and to Section 1.34 of the Commission's Rules of Practice and Procedure to abrogate or modify such opinion and order on the following grounds.

A. *Specifications of Error*

El Paso respectfully submits that in and by the issuance of Opinion No. 348 and accompanying order, the Commission erred to the grievance and prejudice of petitioner in each and all of the following respects:

1. The Commission's action in the issuance of Opinion No. 348 and accompanying order is arbitrary and is in violation of the law.

2. The Commission's action in the issuance of Opinion No. 348 and accompanying order is capricious and is contrary to the established

evidence of the record.

3. The Commission's action in the issuance of Opinion No. 348 and accompanying order is an exercise of authority and of jurisdiction beyond that delegated and provided under the Natural Gas Act.

B. *Brief Restatement of the Cases*

On March 15, 1960, El Paso and Lo-Vaca Gathering Company (Lo-Vaca) entered into a restricted use gas purchase agreement covering gas produced in South Texas deemed by the parties thereto not to be subject to this Commission's jurisdiction (Art. X, Sec. 2, p. 14) because of the provision in Article XVI of said contract providing that all of the gas to be purchased thereunder shall be used by El Paso solely as fuel in its compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas, although such gas will be commingled with other Texas produced gas being transported in El Paso's pipeline system.

On May 16, 1960, these parties entered into another gas purchase contract covering gas produced in South Texas, the use of which by El Paso was unrestricted and which, concededly, is a sale for resale in interstate commerce and subject to the Commission's jurisdiction (R. 21). On July 19, 1960, El Paso and Houston Pipe Line Company (Houston) entered into a restricted use gas purchase agreement covering gas produced in South Texas (Ex. 2) deemed by both parties to be exclusively intrastate in character and beyond the Commission's jurisdiction (Art. XVII, Sec.

17.1, p. 32). The restrictive use limitations are set forth in Art. II, Sections 2.1 and 2.2, pages 4 to 5.

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Briefly, the restrictive clauses provide in substance that the gas so sold will be used and consumed as fuel in El Paso's plant, defined in Art. I, Section (i), page 4, located in Texas. It was recognized that Houston's gas so utilized for fuel consumption within Texas must necessarily be commingled with other Texas produced gas being transported by El Paso in its pipeline system. El Paso covenanted that the gas so purchased from Houston shall be used and consumed by El Paso solely as fuel in the operation of its plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas; that at no time will El Paso take from Houston a quantity of gas in excess of the quantity being consumed at the same time in Texas by El Paso for the agreed uses; that, such volumes will at all times be separately metered when introduced into the El Paso system and separately metered at the points of outlet for fuel usage; that all components of El Paso's plant consuming Houston gas shall physically be located on its system of pipelines and laterals within Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the point of delivery near Three Rivers, Texas; that a sufficient volume of the commingled stream shall by said physical connections reach and pass into components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volumes of gas contributed into the commingled stream at Three Rivers by Houston and that El Paso will retain for six years the meter reading charts to enable proof of the

quantities delivered by Houston and the quantities consumed as fuel.

Lo-Vaca filed its certificate application disclaiming Commission jurisdiction over its restricted use contract (Item A by reference, R. 22). Houston filed no such application. The Commission, by letter dated October 19, 1960, requested the positions of all parties to the project respecting both restricted use contracts. Lo-Vaca replied by letter of November 25, 1960 (R. 22). Both El Paso and Supply Company replied thereto by letters dated November 25, 1960 with exhibits consisting of flow diagrams and schedules (Items C and D by reference, R. 309). Houston replied, on December 15, 1960 setting forth its position of non-jurisdiction by a narrative of the facts and a discussion of the applicable law, citing the same legal authorities relied upon by El Paso in its said reply. Thereafter, Houston, on December 27, 1960, filed its petition for a declaratory order to remove uncertainties as to the Commission's jurisdiction over its proposed sale to El Paso and for a declaration of non-jurisdiction. On February 24, 1961, the Commission issued its order for hearing on the limited question of its jurisdiction over the restricted use contracts of both Houston and Lo-Vaca and consolidated the proceedings for hearing. On March 15, 1961, El Paso was granted intervention in the consolidated proceedings.

The Examiner's intermediate decision issued August 11, 1961 holding that Lo-Vaca would be engaged in the transporation and sale for resale in interstate commerce; that under the proposal of Houston, it would not be engaged in interstate activity and therefore would not be a natural gas company within the definition of the term in the Act. The Commission's Opinion No. 348 and accompanying order to which this

application for rehearing is addressed reversed the Presiding Examiner to the extent that both proposed operations of Houston and Lo-Vaca were subject to its jurisdiction under the Natural Gas Act and upon commencement of such proposed operations, both applicants would be "natural-gas" companies within the meaning of the term in the Act.

C. *Grounds for Abrogation and Reversal of Opinion and Order*

1. The Commission's action is arbitrary and is in violation of the law.

The Commission presents the sole question for disposition in these proceedings to be (mimeo., p. 5)

> ". . . The question before us is whether contractual arrangements and the intention of the parties can segregate Lo-Vaca's and Houston's gas sold to El Paso from other gas received by El Paso regardless of *physical commingling, the actual destination of the gas, and the operations of El Paso's system.* In our opinion, as discussed below, such a segregation would not be achieved here and both sales would be subject to our jurisdiction . . ." (Emphasis Supplied).

The state of the law does not support the Commission's disposition of this fundamental question as is developed hereinafter.

2. The Law on the Question.

If Houston's Texas produced gas were not commingled in Supply Company's pipeline with both streams of Lo-Vaca's Texas produced gas, one concededly jurisdictional

and the other destined for transport across the Texas border for fuel use beyond Texas and were not further commingled in El Paso's facilities beyond Sonora with other Texas produced gas destined for movement in interstate commerce for resale, no one

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could seriously contend that Houston's restricted use gas was jurisdictional. In such event, the transaction would be merely the intrastate transportation within the State of Texas of Texas produced gas for consumption as fuel at plants located entirely in Texas. Metering is legally sufficient to establish the identity and separability of the portion from the gas stream consumed at each plant. Similarly, if Lo-Vaca's restricted use gas were not commingled with its jurisdictional gas and with Houston's restricted use gas in Supply Company's pipeline and were not further commingled beyond Sonora with other Texas produced gas destined for movement in intersate commerce for resale, no one would seriously question the non-jurisdictional character of such a transaction. It would, under such an assumption, be merely the transportation of Texas produced gas in interstate commerce but not for resale for ultimate public consumption. Once again, metering would suffice to establish the identity of and preserve the non-jurisdictional character of the transactions of sales to the different plants beyond Texas, Commingling, then, is the nub of the jurisdictional question. Stated simply, the question becomes, does the transportation of non-jurisdictional gas lose its identity and non-jurisdictional character and become jurisdictional merely because in such transporation it is commingled with jurisdictional gas? We submit that the correct answer is "no."

Mere commingling of non-jurisdictional gas with jurisdictional gas does not cause the former to lose its identity

and to become jurisdictional where the proportion of both in the mixture after commingling are known through metering and where they are the subject of separate sales under separate contracts and where, through metering, the quantities so sold for non-jurisdictional uses can be established at all times. All of these factors are present in the facts here presented.

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The Supreme Court of the United States has unequivocally held in *Peoples Natural Gas Co.* v. *Public Service Commission of Pa.*, 270 U.S. 550, that mere commingling of intrastate gas with gas destined for out of state consumption does not cause the commingled gas stream to become the subject of interstate commerce. Peoples produced its own gas in Pennsylvania which was commingled with gas produced in West Virginia and purchased by Peoples at the state border. The commingled stream was distributed by Peoples in Pennsylvania. At page 555, the Supreme Court said:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other."

The Supreme Court, accordingly, held that the gas produced and distributed in Pennsylvania, although commingled, were transactions in intrastate not interstate commerce. Here, applying this test, the proportions of both the proposed sales by Houston and Lo-Vaca

are definitely known through metering as in that case, although commingled, and that of Houston readily may be and is proposed to be withdrawn from the commingled stream without in any way affecting the transportation or sale of the gas proposed to be sold by Lo-Vaca. They are, therefore, severable and neither affects the character of the other. The gas proposed to be sold by Houston thus retains its intrastate character even though commingled with all the Lo-Vaca gas and Lo-Vaca's restricted use gas retains its

non-jurisdictional character although commingled with Lo-Vaca's jurisdictional gas.

The holding of the Supreme Court in *Peoples Natural, supra*, is still the law. It was not overruled by the later decision in *Pennsylvania Water and Power Company* v. *Federal Power Commission*, 343 U.S. 414. The factual situations presented in these two cases are totally different and readily distinguishable. In *Penn Water*, the energy produced by the companies concerned was not constant and at all times separable so that energy generated in one state was always sold in that state. There was a complete integration and pooling of the power producing and transmission facilities of all three companies. Depending upon the flow of the river, power used in Pennsylvania would be either generated in Pennsylvania or in Maryland and transported to Pennsylvania. Penn Water's sales in Pennsylvania were not, therefore, sales only of the output of its own plant in Pennsylvania but were sales of the output of the integrated and coordinated interstate electric system of which Penn Water's facilities were an integral part. The Supreme Court upheld the Commission's jurisdiction over the operations of such an integrated and coordinated interstate electric system. Here, however, no such inte-

grated and non-severable and non-identifiable situation is presented. *Penn Water, supra*, therefore, neither expressly nor impliedly overruled *Peoples Natural, supra*, and can constitute no authority for a determination that either the Houston or Lo-Vaca restricted use gas is jurisdictional.

In *Penn Water*, there was and could be, because of the coordinated and integrated interstate operation, no separate sale of locally produced energy for local transmission and consumption under separate contract in intrastate commerce. This

completely distinguishes the facts here presented from those there presented.

The later Supreme Court decision in *United States* v. *PUC of California*, 345 U.S. 295 made crystal clear the reason for its decision in *Penn Water, supra*, when it said at page 317:

> "The impossibility of separating interstate from intrastate electricity consumed by each purchaser is patent. In such a case, federal rate jurisdiction must attach to each distributor's negotiated agreement with the seller irrespective of occasional and unpredictable use of non-jurisdictional intrastate power."

The Supreme Court further, in this decision, in effect reaffirmed the doctrine of severability of non-jurisdictional gas from the commingled stream and announced the factors which, if present as here, enables the gas to retain its non-jurisdictional character although commingled with jurisdictional gas when it said at page 318:

> "Assuming respondents' theory, this would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable. The present record will not permit

such a finding. It may be that as an engineering proposition, accurate measurement of the volume resold and the volume directly consumed by the two parties is possible for each billing period. But there is no record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the 'sales' themselves were separate, and it is in these terms that the Act would require us to fix the limits of the jurisdictional grant. The attention of the Commission was not directed towards this matter."

Thus, the Supreme Court reaffirmed its earlier holding in *Peoples Natural, supra,* when, as here, separation of the non-jurisdictional from the jurisdictional gas under each gas purchase contract here in issue is possible. Then, neither affects the character of the other and Federal jurisdiction

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does not embrace the entire commingled stream from necessity because of impossibility of separation. Here, also, the contribution of the Houston and Lo-Vaca restricted use gases is neither occasional nor unpredictable. They are constant and predictable pursuant to specific provisions of the gas purchase contracts under which they are proposed to be sold.

The Supreme Court of Texas has also had occasion to uphold the non-jurisdictional and intrastate character of the shipment of oil produced in Texas although commingled with oil produced in New Mexico. See: *Humble Oil and and Refining Co.* v. *Texas and Pacific Railway Co.*, 289 S.W. 2d 547.

The recent decision of the United States Court of Appeals for the Eighth Circuit in *State of North Dakota* v. *Federal Power Commission*, 247 F. 2d 173 is dispositive of the issue here presented. The facts there presented are on

all fours with those here presented. This decision, we submit, requires a finding that Houston's gas is non-jurisdictional.

In that proceeding, the Commission approved the decision of the Presiding Examiner and held that it had no jurisdictional over the sales made by Signal and Amerada under the "firm gas" contracts based upon a finding that such contracts were clearly intrastate in nature. The court stated the question to be whether natural gas produced, wholesaled, transported and sold within the State of North Dakota became a proper subject for Federal regulation as being in interstate commerce because part of its transportation occurs in a commingled state with gas admittedly being transported to interstate commerce, the purchase contracts for such gas distributed within the state having been executed with each supplier one day prior to execution of the corresponding inter-

state "dump gas" contracts. The court quoted with approval from the decision of the Presiding Examiner, characterizing his finding as "eminently correct." (p. 176):

> "At the outset, it should be noted that this Commission clearly has no jurisdiction over the sales made by Signal and Amerada under the 16-cent 'firm gas' contracts. Under Section 1 (b) of the Natural Gas Act, this Commission has jurisdiction only over the transportation of natural gas in interstate commerce, or the sale in interstate commerce of natural gas for resale. It has no authority to regulate intrastate sales. The gas sold under the instant 16-cent contracts is admittedly produced and consumed wholly within the State of North Dakota both in the communities served from the Tioga-Minot line and in the communities served from the Tioga-Williston line. The conclusion that they are accordingly intrastate contracts is so obvious as to require no extended discussion. The fact

> that this gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9-cent 'dump gas' interstate contracts does not convert the 16-cent 'firm gas' contracts into interstate contracts."

This appellate court, following the holding of *Peoples Natural, supra*, further confirmed our conviction respecting the non-jurisdictional character of the Houston gas when it stated at page 177:

> "There is no commingling of interstate with intrastate gas within the state of North Dakota in the sense of *loss of identity* because the intrastate gas going to the four North Dakota communities named is *separated* from the gas stream in the main line and *metered before any portion* of the gas stream *has left* the *state of North Dakota*. Accordingly, the *quantities* of *intrastate gas* purchased by Montana-Dakota under the 'firm gas' contracts *are easily identifiable* and *determinable*." (Emphasis Added)

Here, obviously, there is no loss of identity of Houston's intrastate

gas going to the compressors within the State of Texas for consumption there as fuel as it will be separated from the gas stream and metered before any portion of the gas stream shall have left the State of Texas. Accordingly, the quantities of this intrastate gas purchased by El Paso under its intrastate contract with Houston are easily identifiable and determinable.

Further support of our position is found in the decision of the United States Court of Appeals for the District of Columbia Circuit in *City of Hastings, Nebraska v. Federal Power Commission*, 221 F.2d 31, *cert. denied*, 349 U.S. 920. The holding there was that gas sold to a city for consump-

tion at its power plant for fuel, authough part of the transported commingled stream of gas included gas destined for resale, did not constitute a jurisdictional sale. The factors, hereinbefore noted, were again clearly detailed in this decision at page 36:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocation of gas and effective separate measurement facilities."

Each of these enumerated factors are here present and require the Commission to find that, by reason thereof, the Houston and Lo-Vaca restricted use gases are non-jurisdictional.

The Commisison has recently reiterated its holding in *Montana-Dakota*, affirmed on appeal *sub. nom. State of North Dakota, supra,* that because the non-jurisdictional gas was carried commingled with jurisdictional gas the former did not lose its identity as non-jurisdictional gas. This it did in the matter of *Oklahoma Natural Gas Company*. 23 FPC

291, 294. In that decision, the facts presented were carefully distinguished from those involved in *Montana-Dakota*. In *Oklahoma Natural*, as a result of the exchange agreement between Consolidated and Oklahoma Natural, there was proposed no increase in the amount of gas available to Consolidated. The Commisison concluded (p. 293) that because Consolidated has not increased its deliveries to its Oklahoma customers, Consolidated was attempting, by means of a contractual provision, to substitute Oklahoma Natural's gas for its *interstate* gas from Texas in making its Oklahoma deliveries. The facts here presented are the

antithesis of those there in issue. Here, by reason of the use of the Houston and Lo-Vaca restricted use gases for compression fuel, an equivalent amount of additional gas becomes available to El Paso for use by its customers. Moreover, a diametrically opposite factual situation existed in *Oklahoma Natural* than that here presented respecting the flow of the commingled gas stream and the points of takeoff therefrom. Consolidated's gas stream, with which the gas sold by Oklahoma Natural became commingled, had passed from Texas into Oklahoma and was thus in interstate commerce at the point of delivery of Oklahoma Natural's gas. Here, the gas stream has not left the State of Texas at every point of departure therefrom of Houston's gas. This was termed the "salient distinction" between the *Oklahoma Natural* and *Montana-Dakota* cases, (p. 296). Clearly, therefore, the *Oklahoma Natural* decision cannot be considered any authority for a finding that the gas of Houston is jurisdictional. For the foregoing reasons, it is respectfully submitted that such gas is patently non-jurisdictional and that the Commission should so declare.

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Lo-Vaca's contract of March 15, 1960 is asserted by it to be non-jurisdictional with which El Paso concurs. The foregoing authorities on separability, identity, measurements and use of this gas in intrastate commerce are equally applicable to the gas proposed to be sold under this contract. True, it is proposed to be transported in interstate commerce through the proposed facilities of El Paso Supply and El Paso Natural which gives the Commission jurisdiction over their transportation facilities. The sale proposed by Lo-Vaca, however, is not one in interstate commerce for resale for ultimate public consumption. The Commission possesses no jurisdiction, we submit, over this proposed sale under the plain language of Section

1(b) of the Act and the applicable authorities. *Panhandle Eastern* v. *PSC of Indiana*, 332 U.S. 507, 517.

City of Hastings, Nebraska, supra, is dispositive of this issue and, as well, requires a finding that this restricted use sale proposed by Lo-Vaca is non-jurisdictional. There the pipeline company, after gathering gas of its own production as well as purchases from other producers situated in Kansas, transported such gas into Nebraska where it was resold by direct sale for industrial usage in Nebraska. The court held the direct sale for such use to be non-jurisdictional, although the gas had been transported in interstate commerce by a natural gas company subject to the Commission's jurisdiction, because under Section 1 (b) of the Act a direct sale for consumptive use is not a sale for resale over which along the Commission has jurisdiction. Congress, the court noted, made sure that its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to any other sale." Those words, said the court, plainly mean that the Act shall not apply to any sales

other than sales "for resale for ultimate public consumption, for domestic, commercial, industrial, or any other use. Direct sales for consumptive use of whatever sort were excluded." In summary, the court said. "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive use." Admittedly, such Lo-Vaca gas will be sold directly to El Paso under the terms of this contract not for resale by El Paso for ultimate public consumption, but for consumptive use by El Paso to meet a portion of its compressor fuel requirements outside the State of Texas. The Gas so proposed to be sold to El Paso, for these reasons, must, accordingly, be held to be non-jurisdictional.

3. *The Commission's Action Is Capricious and Is Contrary to the Evidence of the Record.*

The Commission seemingly bases its determination of jurisdiction in these matters on the following conclusions of the evidence (mimeo., pp. 3, 4):

> ". . . Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas . . . On an average day their requirements *would exceed the average day volume to be purchased* from Houston by 6.091 M²cf per day *and on a maximum day would exceed the supply* by 31.879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations . . .
>
> The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which would allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract *would exceed the gas purchased from Lo-Vaca* by 21.373 M²cf per day *on an average day* and

> by 36.549 M²cf per day *on a maximum day.* However, the record makes it clear that *because of commingling,* the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California . . ." (Emphasis Supplied)

El Paso submits that in the foregoing part the legal significance of commingled gas supplies from the interstate commerce aspect has been disposed of to the conclusion that the Commission's exclusive reliance thereon has been misplaced. El Paso, in this part submits that the Commission's conclusions of fact on the evidence does not

correctly nor completely reflect the state of the record as developed below.

4. *The Evidence of Record.*

It is clear that if, when the project becomes operative, El Paso can and will perform its obligations under its restricted use contracts with both Houston and Lo-Vaca and they, in turn, can and will deliver to El Paso only Texas produced gas, then the proposed sales are, under applicable law hereinafter set forth, non-jurisdictional. This is the crucial factual situation. However, the evidence is undisputed that the parties to these contracts can and will perform these contractual obligations.

The evidence, pertinent to decision of the jurisdictional question, produced at the hearings may be briefly summarized as follows: All of this restricted use gas is produced in Texas (R. 128, 26). It will be commingled in Supply Company's line after accurate metering thereof at the point of delivery, transported to Sonora and further thereafter transported through existing and proposed facilities commingled

with other Texas produced gas (R. 114, 118, 122). As the Commission cites, El Paso will at all times utilize from the common stream an amount for fuel for its plants in Texas and for the Phillips plant in Texas in excess of the amount purchased and received from Houston (R. 128, 343). Again, the Commission agrees that El Paso will also consume as fuel in its plant outside Texas at all times from the common stream an amount in excess of the amount purchased and received from Lo-Vaca under the restricted use contract (Exh. 7, 8). Fuel uses at all of such plants will be separatedly metered (R. 125, 126, 218, 181, 328, 343). This is the only way to determine the fuel uses as,

following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed or remained in the commingled stream (R. 344). It should be recalled, parenthetically, that metering is the accepted and standard method for determining non-jurisdictional pipeline sales effected from the common stream. The existing and proposed pipelines of both Supply Company and El Paso which will be utilized to transport the Houston gas to points of ultimate consumption thereof at plants wholly within the State of Texas as well as the locations of those plants and the Phillips plant all within the State of Texas are graphically portrayed in Exhibit 6. Not all of El Paso's existing plants in Texas will be so employed and such other plants could, if necessary, consume portions of the Houston gas as fuel (R. 138, Ex. 6). It is thus apparent that through existing and proposed facilities Houston's Texas produced gas may be transported wholly within Texas in a continuous flow downstream from the delivery point and delivered to designated existing and proposed plants,

all within the State of Texas, without any of the commingled stream of only Texas produced gas ever leaving the State of Texas or having injected therein any gas produced in any state other than Texas (Ex. 6, R. 139, 140). The only possibility of injection into the gas stream of gas produced outside the State of Texas would be with reference to Lea County, New Mexico, produced gas. After construction of the proposed 16 inch line shown in red on Exhibit 6 connecting Keystone main line station with the El Paso station, it will be impossible for Lea County gas to enter that proposed line (R. 349). The specific existing and proposed plants of El Paso in Texas in which Houston gas will be consumed as fuel and the plants in New Mexico and Arizona in which Lo-Vaca's restricted use gas will be used for fuel

are identified (Exs. 7 and 8, R. 141). The actual fuel requirements of such plants and the estimated fuel requirements of the proposed plants on both an average and a peak day appear on the flow diagrams, Exhibits 7 and 8. The directions of the flow on each of such days is shown by the red arrows, particularly identifying the respective flows of the Houston and Lo-Vaca restricted use gases. It is evident therefrom that the Houston gas will flow only in Texas while the Lo-Vaca restricted use gas will flow both in Texas, New Mexico and Arizona (Exs. 7 and 8; R. 145-147). It thus conclusively appears that on both the average and peak day the fuel requirements of the specified plants exceed by wide margins the volumes of gas to be purchased by El Paso for such use from both Houston and Lo-Vaca (Exs. 7 and 8; R. 149-150). It thus appears that through existing and proposed facilities El Paso can and will perform its contract obligations with both Houston and Lo-Vaca (R. 148). El Paso can and will

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so perform even on a minimum day. No exhibit was submitted respecting minimum day fuel requirements of these plants or a flow diagram applicable to such a day because of the difficulty of accurately determining a minimum day because of the possibility of equipment failure (R. 341). At all times, however, even on a minimum day, Houston and Lo-Vaca's restricted use gas will be used only for fuel in the specified plants strictly in accordance with the respective contract provisions (R. 158). El Paso at all times and even on a minimum day can and will regulate its takes from both Houston and Lo-Vaca to assure that it takes from neither any greater quantities than it will burn as fuel in the plants at which it will consume the respective gases. Only such quantities and no more will ever be taken. El Paso has the means to assure this and be on the safe

side (R. 356). The aforesaid flow diagrams were augmented by flow diagrams showing El Paso's Southern system design capacity and its Permian field design capacity (Exs. 9 and 10). Detailed engineering design data are shown to demonstrate, after operation of this project, the capacities of the two systems to accept deliveries of the restricted use gases of Houston and Lo-Vaca, to transport them as contractually required, to deliver them to the specified plants at which they will be consumed as fuel and otherwise to perform El Paso's contractual obligations (R. 159). El Paso will do whatever is required to perform its contract obligations (R. 266-267; 272, 307). Separate meters will be employed to accurately measure the quantities received by El Paso from Houston and from Lo-Vaca under each of its two contracts (R. 25, 343). Separate meters will record the receipt of other Texas produced gas entering the gas stream and separate meters will record the deliveries to the plants at which the restricted

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use gases of both Houston and Lo-Vaca will be consumed as fuel (R. 343). Such metering is the only method by which direct sales for non-jurisdictional fuel consumption uses may be established. It is not possible to demonstrate on a molecular basis that particular molecules attributable to identified vendors were or were not so employed (R. 332, 343). In a few relatively minor and insignificant instances, proposed fuel lines will constitute duplicates of existing facilities (R. 354). Proposed construction of such duplicate facilities to accomplish the contractual obligations respecting restricted use for fuel is not relevant to the jurisdictional issue here presented. This record shows, additionally, that other existing plants in Texas could be specified. Duplicating of fuel lines might thus be avoided. Most importantly, when this project becomes operative, the

quantities of gas now being consumed as fuel in existing plants and stations of El Paso become available to the system and to the customers served thereby. There will be no cut back (R. 370). The necessary effect is an increase in system capacity in large amounts and access to the prolific reserves of South Texas. Title to the gases proposed to be delivered under each of these restricted use contracts passes to El Paso at the delivery point near Three Rivers, Texas, by the express provisions of each of the contracts. Each company, in the contracts, warrants its title to and ownership of the gas prior to delivery thereof to El Paso free of liens or incumbrances and further warrants its right to sell the gas to El Paso. All of these contractual provisions are now effective despite the apparent confusion of Mr. Ware when testifying (R. 47-50). All of the contracts supporting the dedication of the reserves

committed by Lo-Vaca to its contracts with El Paso have been executed between Lo-Vaca and the producer (R. 53).

5. *On the basis of the evidence of record therefore the following facts are established:*

(a) The entire courses of the dealing as between El Paso and Lo-Vaca clearly establish the existence (as between the proposal conceded to be jurisdictional and that contended to be not subject to the jurisdiction of this Commission) of the *bona fide* distinctions of separate negotiations, separate contracts, separate billings, separate allocation of gas and effective separate measurement facilities.

(b) That although insofar as the purchases by El Paso from Lo-Vaca making up the composite gas stream are indistinguishable to the extent of being suscep-

tible to determination of the precise identity of the parts making up the whole, the proportions of the volumes contended by the parties to be non-jurisdictional as against the volumes concededly jurisdictional are known and that of either may readily be transported without affecting the transportation or sale of the remainder.

(c) The entire course of dealing leading up to the

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proposal of Houston, as between El Paso and Houston definitely and clearly establish the existence of the significant physical and legal distinctions of the existence of a separate and individual rate for the gas to be purchased (Op. 348, mimeo. p. 2); separate billings; separate negotiations; separate allocation of gas; and effective separate measurement facilities.

(d) There is no commingling in the sense of loss of identity of intrastate gas volumes to be consumed in Texas *versus* interstate gas to be transported and sold to others elsewhere, because the intrastate volumes are to be accurately measured upon receipt and consumption by El Paso; El Paso's intrastate facilities are more than competent to receive and utilize such intrastate deliveries; and such intrastate volumes are to be separated from the gas stream and metered before any portion of the gas stream has left the State of production.

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6. *The Commission attempts to exceed its jurisdiction as delegated under the Natural Gas Act and to repudiate its own established precedent laid down in conformity with the law*

The Commission in its Opinion No. 348 and its accompanying order, seeks at once to expand the abridged position as taken therein to cover the seemingly extremely broad area as to that which encompasses the question of "... *What constitutes interstate commerce* and *our jurisdiction under the Natural Gas Act.*"

It would appear that both areas have been delineated both by the courts and the Commission. Accordingly, these areas are not new, and have been authoritatively exhausted.

The foregoing state of the matter seemingly is recognized by the Commission in Opinion No. 348 where it states (mimeo. p. 5):

> "... In reaching this conclusion, we are cognizant of the fact that there exist in the natural gas industry arrangements whereby companies transport natural gas for other companies, commingling it with gas from various sources. *Although under some of the transportation arrangements, gas is purchased by the ultimate recipient directly from producers,* generally there is no earmarking of specific gas to the ultimate destination. The delivering company is simply obligated to deliver a specified volume ... *It is not our intention by this opinion to disturb such transportation arrangements ...*" (Emphasis added)

It can only be presumed that the Commission sought to distinguish the present proposals from essentially similar circumstances

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which have been presented and certificated by the Commission without it therein having laid claim to jurisdiction over the producer-sellers. That is, the Commission seems to state that it is aware that it has approved arrangements

whereby *interstate* companies transport gas for a third party purchased by it in turn from an *intrastate* supplier, but that in such circumstances the sale is not a sale for resale in interstate commerce and therefore distinguishable.

El Paso submits that the Commission in its action was erroneous in determining jurisdiction in Opinion No. 348, whereas it has disavowed jurisdiction on occasions in circumstances far less clear and convincing than those here present. By way of illustration, the Commission passed upon the following stated arrangement in its Opinion No. 301 issued December 28, 1956, 16 F.P.C. 118, 121:[1]

> ". . . Under the parties' present proposals, Coastal would initially constitute Houston Gas' sole source of supply and the latter in turn would constitute Coastal's sole market . . .
>
> However, a substantial part of the foregoing volumes —some 150,000 Mcf per day average—would consist of "transportation" gas, that is gas delivered to two large Florida power companies for use as boiler fuel in generating electricity. This gas transportation arrangement is a distinguishing feature of applicants' proposals. Under it, gas is purchased by the power companies, Florida

> Power & Light Co. (Florida Power & Light) and Florida Power Corp. (Florida Power) in producing fields in Texas and Louisiana. Received initially by Coastal, it is transported by Coastal and Houston Gas

[1] *Houston Texas Gas & Oil Corp.* and *Coastal Trans. Corp.*, Docket Nos. G-9262 and G-9960; reh. den., 17 F.P.C. 542; aff'd. 251 F. 2d 643, *cert. den.* 356 U.S. 959, *C.f. Transcontinental Gas Pipe Line Corp.*, Docket No. G-13143, 21 F.P.C. 138, 141, aff'd. 271 F. 2d 942; 365 U.S. 1.

successively for a charge to its delivery point to the power companies in Florida . . ."

In the foregoing circumstances, the purchaser in the fields of certain states was the consumer in another state, with the gas being commingled in interstate transit with gas destined for resale sale. Yet, in these circumstances, the Commission refused to extend its jurisdiction to the point of attempting to exercise its authority over the sale by the producers and purchase by the power companies of the large gas volumes involved. It seemingly can do no less here where the facts are even more clear and distinct. Here, militating against claim of jurisdiction, there is no third party purchaser as between the pipeline-transporter and the producer-supplier. Neither is there interstate transmission, at least in the instance of the Houston proposal. No transportation rate is involved. There is no competition between a pipeline and a large volume, non-jurisdictional direct purchaser of natural gas in the field. *Transcontinental Gas Pipe Line Corp.*, Docket No. 13143, *et al., supra,* 21 F.P.C. at 141.

By reason of the foregoing, El Paso respectfully suggests that the Commission in the issuance of Opinion No. 348 and accompanying order has exceeded its jurisdiction under the Natural Gas Act, and in so doing has overthrown clear and long established principles of law and its own body of precedent.

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7. *The Commission's unlawful extension of jurisdiction contravenes the Act and is not supported by the cases cited*

a. *Limit of Commission's Authority to Regulate Commerce*

In its decision in *Oklahoma Natural Gas Company, et al.*, 23 F.P.C. 531, in response the the objection that it had based

jurisdiction on "affecting consumers beyond the state boundary," the Commission stated (p. 534):

> "We did not base our jurisdiction on its 'affecting' commerce, but on Oklahoma Natural's transportation and sale being in interstate commerce as part of a transaction essentially interstate with interstate consequences. The term 'interstate commerce' is defined in Section 2 of the Natural Gas Act to mean 'commerce between any point in a state and any point outside thereof. This, in our opinion, is the case here. We cited, *Gibbons* v. *Ogden*, 9 Wheat. 1, 194 to further define the concept of interstate commerce. We had no intention of implying that we had power to extend our regulation to the full extent of the Constitutional power over commerce."

By the foregoing language, the Commission clearly acknowledges the limitation imposed upon its jurisdiction by Section 2(7) of the Act. Therefore, the cases cited by the Commission in definition of the term "interstate commerce" in an effort to establish its jurisdiction in the case at bar are wholly inapposite, for they give content to the "full extent of the Constitutional power over commerce" and thereby transcend the less comprehensive standard of the Act. The Commission cannot in this manner extend its jurisdiction beyond that conferred upon it by Congress. It may not by administrative

interpretation clothe itself with a power denied by Congress. *Hope Natural Gas Co.* v. *FPC*, 134 F. 2d 287, rev. on other grounds, 320 U.S. 591.

b. *Inapplicability of Cited Cases*

In addition to the foregoing, many of the cases cited by the Commission in its discussion of interstate commerce

are inapplicable for other reasons. For example, the case of *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, turned upon the fact that the wheat destined for use in Tennessee was to be delivered on board a common carrier in Kentucky. We have no common carrier in the present case. *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46 (D.C. Cir., 1952). Again, the case of *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, is quoted by the Commission on page 6 of its opinion for the proposition that the sale of gas originating in one state and transported and delivered to distributors in another state is subject to Commission regulation. We have no distributors involved in the case at bar, nor any sale for resale. These examples serve to illustrate the Commission's unwarranted extension of jurisdiction in the case at bar is not supported by the authorities cited and that the Commission has erred in attempting to assume regulatory control over an area that was expressly exempted from regulation.

c. *The Commission is Bound by Applicable Judicial Decisions*

The Commission is required to administer the law as it finds it. As stated in *Phillips Petroleum Co.*, 10 F.P.C. 246, 262:

> "... We must remember that our responsibility is to administer the law as we find it, whether or not

> the result agrees with what some would perhaps like it to be."

The law controlling in the case at bar is that laid down in *North Dakota* v. *F.P.C.*, 247 F. 2d 173 (8th Cir., 1957), *People's Natural Gas Co.* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550 (1926) and *City of Hastings*,

Nebraska v. *F.P.C.*, 221 F. 2d 31 (D.C. Cir., 1954). The Commission is not empowered to reverse or otherwise modify *sua sponte* the law thus declared. Accomplishment of the end sought to be achieved in Opinion No. 348 and the accompanying order rests with Congress. The remedy is amendatory legislation and not administrative construction of the Natural Gas Act so as to bring about a result not contemplated by Congress as interpreted by the courts. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 515-16 (1949); *Price* v. *Gurney*, 324 U.S. 100, 107 (1945); *A.F.L.* v. *NLRB*, 308 U.S. 401, 411-12 (1940).

D. *Conclusion*

WHEREFORE, by reason of the foregoing and on the grounds advanced herein, El Paso Natural Gas Company respectfully urges the Federal Power Commission to reverse the conclusions contained in its Opinion No. 348 and to modify the order therein contained by disclaiming jurisdiction under the Natural Gas Act over the proposals presented in Docket Nos. CI60-693 and CP61-177.

Respectfully submitted,

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(Filed Nov. 22, 1961)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CI60-693

LO-VACA GATHERING CO.

Docket No. CP61-177

HOUSTON PIPE LINE COMPANY

Application for Rehearing on Behalf of Lo-Vaca Gathering Co.

* * * * * * * * * * *

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Lo-Vaca Gathering Co. (Lo-Vaca) hereby files its application, pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, for rehearing of the Commission's Opinion and Order Determining Jurisdiction issued in these proceedings on October 23, 1961. In support whereof, Lo-Vaca shows as follows:

I

INTRODUCTION

Much of the Commission's opinion issued October 23, 1961, is concerned with a legal analysis of the nature of interstate commerce (Opinion, pp. 5-8). However, Lo-Vaca does not contend that its restricted-use sale to El Paso Natural Gas Company (El Paso) is not in interstate commerce. Admittedly, the sale of gas in Texas for transportation and consumption by the purchaser outside the state is a sale in interstate commerce. Thus, the long line of authorities from *Gibbons* v. *Ogden*, 9 Wheat 1 (U.S. 1824)

through *Lemke* v. *Farmers' Grain Co.*, 258 U.S. 50 (1922) and *Public*

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Utilities Commission of Rhode Island v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) to *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954) which are cited by the Commission in a partial delineation of the meaning of interstate commerce have no relevance to the Lo-Vaca proceeding.[1] The narrow question presented by Lo-Vaca's restricted-use sale may be stated as follows:

> If a gatherer sells natural gas in the State of Texas to a pipeline company with a restriction that such gas shall be directly consumed by the pipeline outside of Texas, does the Commission gain jurisdiction over the sale by reason of physical commingling by the pipeline of the gatherer's gas with other gas destined for resale outside the State of Texas?

We submit that the Commission erred in concluding that it would gain jurisdiction over Lo-Vaca's direct sale by reason of commingling with gas which would be resold in interstate commerce. Accordingly, we shall relate below the fundamental misconceptions of the Commission's authority under the Natural Gas Act and the misinterpretations of pertinent case authorities which led the Commission to its erroneous conclusion. Preliminarily, however, in order that there may be no mistake having its origin

[1] Only one of the cases cited by the Commission touches upon the question of whether a sale for resale retains its intrastate character through a restriction that the resale must take place within the state of origin. This case is *North Dakota* v. *Federal Power Commission*, 247 U.S. 173 (8th Cir. 1957), which squarely holds that such a restriction on the resale of the gas effectively maintains the intrastate nature of the transaction. (*Id.*, p. 178)

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in a misreading of record facts, it is hereby requested that the Commission make express findings as follows:

II

EXPRESS FINDINGS REQUIRED BY RECORD FACTS

Lo-Vaca entered into two contracts with El Paso (Exhibit Nos. B-1 and B-2 to Lo-Vaca's application, Item A by reference). One contract, dated March 15, 1960, calls for the sale of 50,000 Mcf per day subject to the condition that all such gas shall be used by El Paso exclusively as fuel in its compressors, treating plants, boilers, camps, and other facilities located outside the State of Texas (Exhibit B-1 to Item A). In this application for rehearing we shall refer to this contract as the restricted-use contract. It is the subject matter of this application for rehearing. The other contract, dated May 16, 1960, calls for the sale to El Paso of 80,000 Mcf per day. This is an unrestricted sale for resale for which Lo-Vaca requests a certificate of public convenience and necessity (Exhibit B-2 to Item A). The Commission recognizes that no contention is made by Lo-Vaca that the transportation of the gas in interstate commerce is beyond Commission jurisdiction. Lo-Vaca contends only that its restricted-use sale is a direct sale not subject to Commission jurisdiction under Section 1(b) of the Natural Gas Act. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947)

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The record shows that in all aspects the two Lo-Vaca contracts are entirely separate. It is requested, therefore, that the Commission expressly find:

(1) The gas to be sold by Lo-Vaca to El Paso, the 50,000 Mcf per day which is restricted for consump-

tion by the purchaser and the 80,000 Mcf per day which is unrestricted and available for resale anywhere on El Paso's system, is sold under separate contracts (Exhibits B-1 and B-2 to Item A).

(2) The two sales contracts were separately negotiated (T. 24-25).

(3) The reserves dedicated to the two sales are separate and distinct (T. 64-65).

(4) The volumes delivered by Lo-Vaca are to be separately metered (T. 25, 266-267, Articles VI and VII to Exhibits B-1 and B-2 of Item A).

(5) The volumes are to be delivered at separate delivery points (T. 35, Articles VI and VII to Exhibits B-1 and B-2 of Item A).

Based upon these five fundamental findings, there can be no doubt that Lo-Vaca's two contracts meet the tests of separateness relied upon by the Court of Appeals for the Eighth Circuit in *North Dakota* v. *Federal Power Commission*, 247 F.2d 173, 177 (8th Cir. 1957) and the Court of Appeals for the District of Columbia Circuit in *City of Hastings* v. *Federal Power Commission*, 221 F.2d 31 (C.A.D.C. 1954), and recognized by the Supreme Court in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 317-318 (1953). Consequently, on the facts of record, it is only by refusal to adhere to these established precedents that the Commission can assert jurisdiction over Lo-Vaca's restricted-use sale.

III

Established Precedents Require Denial of Jurisdiction

In its opinion the Commission purports to distinguish controlling court cases which, if followed, must result in a

finding that Lo-Vaca's restricted-use sale is non-jurisdictional. In part, the Commission's erroneous conclusion seems to be based upon of fact,[2] in part, they are based upon an improper analysis of the cases. Because of the importance of these cases to the *Lo-Vaca* proceeding, we shall treat each in some detail below.

1. *The Commission misreads controlling procedents.*

First, contrary to the Commission's assertion that *United States* v. *Public Utilities Commission of California, supra,* (hereinafter termed the *California* case) involved a sale of electric energy in the state where consumed, that case involved a direct sale of energy to be consumed in a state other than the state wherein the sale took place. What was involved was a sale in the State of California, by California Electric Company, of electric energy which was transmitted by the purchaser across the state line into Nevada. The energy was then in part, resold, in Nevada and, in part, directly consumed by the purchaser. 345 U.S. at pp. 297-298. Thus, in this respect, contrary to the Commission's statement, the *California* case involved facts directly analogous to those

involved in the proposed restricted use by Lo-Vaca. Both cases involve direct sales in one state for consumption by the purchaser in another state.

What distinguishes the *California* case from the *Lo-Vaca* proceedings is the separability of the direct sale from the sale for resale in the *Lo-Vaca* case. The Supreme Court noted this separability to be lacking in the *California* case

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[2] See, *e.g.*, Opinion, page 9, with regard to factual situation involved in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295 (1953).

and on that basis permitted federal regulation of the sale for resale to encompass, as a necessary incident, the non-jurisdictional direct sale (345 U.S. 295, 317-318). But where there is a direct sale in interstate commerce entirely separate from a sale for resale in interstate commerce to the same customer, the Court was of the opinion that the direct sale could be regulated separately even though the energy to supply both sales might be commingled (*Id.*).

Thus, we agree with the Commission's statement (Opinion, page 9) that the *California* case "does not involve an interstate commerce question at all, but a possible segregation between a direct sale and resale." We agree in the sense that no interstate commerce issue was raised in that case just as Lo-Vaca is not here contending that its direct or restricted-use sale would not be in interstate commerce. The Commission's admission with regard to the *California* case (Opinion, p. 9) is likewise applicable to Lo-Vava's restricted-use sale. For, just as the direct sale of electric energy to the Navy "would thus have been exempt from our jurisdiction if it had been a separate transaction," the restricted-use sale by

Lo-Vaca to El Paso would be exempt from Commission jurisdiction because it is a separate transaction.

The Commission has also improperly analyzed *City of Hastings* v. *Federal Power Commission*, 221 F.2d 31 (C.A.D.C. 1954). The fact that the direct sale by Kansas-Nebraska Natural Gas Company to the City of Hastings took place in the same state as final consumption has no bearing upon the legal conclusion whether such a sale would be subject to the Commission's jurisdiction. The direct sale to the City of Hastings was a sale in interstate commerce just as the restricted-use sale by Lo-Vaca would be.

The fact that the gas was consumed by the City of Hastings in its own power plant after transportation by the City for a short distance after receipt from the pipeline company did not mean that interstate commerce had ended with delivery of the commingled stream at the city gate. *Pennsylvania Gas Company* v. *Public Service Commission of the State of New York*, 252 U.S. 23, 27-28 (1919).

A review of other pertinent facts of the *City of Hastings* case reveals its real impact upon the factual situation proposed by Lo-Vaca's restricted-use sale, for those facts show that the Commission disclaimed jurisdiction over the direct sale solely upon the separability of contracts doctrine.

Kansas-Nebraska delivered gas to the City of Hastings at the city gate at one delivery point. This gas included the volumes resold by the City for ultimate public consumption. It also included volumes to be consumed in the City's power plant.

At the point of delivery, the jurisdictional direct-use volumes and the resale volumes were in a commingled state as they had been throughout their interstate journey. After delivery to the City, the volumes were transported further in the same commingled stream to a point where the direct-use gas was diverted to the power plant. Obviously, because of the commingling, it could not be determined at the point of delivery whether some of the gas delivered to the City for direct use might physically be resold for public consumption. Despite this fact, the Commission found, on the basis of the separability of the two contracts, that its jurisdiction did not extend to the direct-use contract.

In this regard, the Staff's argument, referred to on page 5 of the Opinion, that buyers and sellers cannot determine

the jurisdictional status of their sales by their contracts is completely refuted. If two parties make a contract for sale wherein it is agreed that the purchaser will consume the gas itself, the Commission has no jurisdiction over that sale. For, as held by the Supreme Court in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947), the Commission's jurisdiction is limited to three things only:

(1) transportation of natural gas in interstate commerce;

(2) sales of natural gas in interstate commerce for resale; and

(3) natural gas companies engaged in such transportation or sale.

Contrary to the implication in the Staff's argument, the scheme of regulation provided by the Natural Gas Act did not limit a natural

gas company's right to contract. This power was preserved. *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332, 338 (1956).

The Commission frankly admits that *North Dakota* v. *Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957) requires that Lo-Vaca's restricted-use sale be determined to be non-jurisdictional. Being unable to explain away the force of that precedent, the Commission seeks to reverse the holding of the Court of Appeals for the Eighth Circuit. But that case, like this, involved sales of natural gas to a pipeline under two different contracts, where the volumes of gas attributable to the jurisdictional and non-jurisdictional contracts were commingled upon delivery to the pipeline. Upon receipt of all volumes by Montana-Dakota

Utilities Company at the outlet of the Tioga Plant, the volumes destined by contract for a non-jurisdictional sale within North Dakota could not be physically distinguished from the volumes destined by a separate contract for jurisdictional sales outside the State of North Dakota. The physical segregation did not take place until the gas was delivered to the four small towns along the route of the interstate pipeline.

In a like manner, Lo-Vaca's restricted-use gas is to be sold under an entirely separate contract from the contract relating to the unrestricted gas. It will be transported in a commingled stream along with the unrestricted gas. However, like the firm intrastate gas in the *North Dakota* case, it is segregated at the

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point of consumption.

It may be noted that the Lo-Vaca restricted-use sale differs from the *North Dakota* case facts in two aspects which serve to strengthen the non-jurisdictional nature of the Lo-Vaca sale. First, the *North Dakota* case did not concern a direct sale over which the Commission is denied jurisdiction by statute. That case involved a sale for resale which the Commission and the Court of Appeals held was not subject to the Commission's jurisdiction even though the resale volumes were commingled in an interstate stream. Thus, the doctrine of separability of contracts was applied to determine the intrastate character of the transaction. Parenthetically, in this regard, it may be seen that the *North Dakota* case is directly controlling in the factual situation posed by the proposed sale by Houston Pipe Line Company in Docket No. CP61-177. Manifestly, if the doctrine of separability of contracts determines the intrastate nature of a sale for resale, it also determines the non-jurisdictional nature of a direct-use sale in interstate

commerce. *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 317-318 (1953).

Secondly, the attributes of separability are more pronounced in the Lo-Vaca proposal than they were in the *North Dakota* case. Thus, separate and distinct reserves are dedicated under the two Lo-Vaca contracts. And, the Lo-Vaca volumes will be separately metered at the proposed delivery points. In the *North Dakota* case there was no separate dedication of reserves and the firm and interruptible volumes were not separately metered at the outlet of the Tioga Plant.

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2. *The Commission does not gain jurisdiction because of possible effect upon regulatory powers.*

The partially hidden rationale of the Commission's opinion rises to the surface in its candid remark that if it reached a different conclusion, "our regulation of gas rates would be handicapped." (Opinion, p. 9). The Commission then points out that a pipeline might offer higher prices for the non-jurisdictional gas than would be permitted under the area pricing policy applicable to jurisdictional sales. The short answer, is, of course, that the Commission cannot regulate non-jurisdictional sales because of the effect such sales may have upon regulation of jurisdictional sales. Neither can it achieve the same result by assuming jurisdiction over transactions which are not within the scope of its express statutory power. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507, 514-518 (1947).

The fact that El Paso may operate an integrated pipeline system for the primary purpose of moving gas from the permian Basin and other sources to consumers in a number of states, does not make jurisdictional a transaction which is excluded by the Natural Gas Act from Com-

mission regulation. *North Dakota* v. *Federal Power Commission*, 247 F.2d 173, 177 (1957).

But, the Commission states, Lo-Vaca's restricted-use sale could not be regulated by Texas (Opinion, p. 9), apparently basing its conclusion on the ground that the sale would concern more states than one. However, by definition, any sale in interstate

commerce concerns "more states than one." Yet, the Commission has regularly conceded that it has no jurisdiction over direct-use sales in interstate commerce as, of course, it must, under Section 1(b) of the Natural Gas Act. For instance, the *Houston-Coastal* proceedings involved sales by producers in Texas to power companies in Florida.[3] Certainly, these sales involved "more states than one."

Furthermore, the Commission has, by its own affirmative action granting abandonment, recognized that a direct-use sale is not subject to its jurisdiction even though the direct-use gas is commingled in an interstate stream with other gas sold for resale. Thus, in *Hope Producing Company, et al.*, Docket Nos. G-15537, *et al.*, order issued February 3, 1959, the Commission permitted the abandonment of a sale for resale by Hope Producing Company to Arkansas Louisiana Gas Company (Arkansas Louisiana). Concurrently, Arkansas Louisiana discontinued its sale to Southwestern Electric Power Company. In substitution therefor, Hope Producing Company continued deliveries to Arkansas Louisiana for the account of Southwestern Electric Power Company. The transportation by Arkansas Louisiana continued to be subject to the Commission's jurisdiction but what had formerly been a sale for resale subject to the Commission's jurisdiction became a non-jurisdictional

[3] *Houston, Texas Gas and Oil Corporation and Coastal Transmission Corporation*, 16 F.P.C. 118 (1956).

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sale by reason of the new contractual arrangements.

Further, the consistent failure of the Commission to exert jurisdiction over direct-use sales indicates that the Commission does not believe that the power exists. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 513 (1949); *City of Hastings* v. *Kansas-Nebraska Natural Gas Company*, 12 F.P.C. 12, 18 (1953). This is evidenced by the Commission's recommendations to Congress that its authority be broadened to include certificate control over direct-use sales. (See, *e.g.*, Thirty-second Annual Report of the Federal Power Commission, p. 152 and Thirty-third Annual Report of the Federal Power Commission, p. 154). The fact that Congress has not granted this request is firm indication that the Commision may not exercise jurisdiction over such sales.

3. *Commission assertion of jurisdiction would deny legal consequence of fungibility.*

Essentially, in holding that Lo-Vaca's restricted-use gas is jurisdictional merely because it is commingled with gas transported and sold for resale in interstate commerce, the Commission negates the concept of fungibility. Yet, we do not understand the Commission to hold that natural gas is not a fungible commodity (See, *Black's Law Dictionary*, 4th Ed. 1951).

We submit that a basic consequence of fungibility of natural gas is the legal right of contracting parties to assume separate identity of volumes of gas even though commingling may erase any separate physical identity. A contrary conclusion would

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deny logic to the entire line of cases beginning with *People's Natural Gas Co.* v. *Public Service Commission of*

Pennsylvania, 270 U.S. 550 (1926) where the Court held at pages 554-555:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course, after the commingling, the two are undistinguishable. But the proportions of both in the mixture are known, and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other."

In this regard, the Commission's attention is also directed to the opinion of the Court of Appeals for the Fifth Circuit in *Federal Tender Board No. 1* v. *Haynes Oil Corporation*, 80 F.2d 468 (5th Cir. 1935). That case involved "contraband oil" which had been commingled with oil which had been produced in accordance with conservation laws of Texas and hence not "contraband." The Board contended that each barrel of oil in the commingled total was composed in part of the contraband oil and was contaminated by it. Significantly, the Court held that if the entire tank of commingled oil had been tendered, the Board would have been correct. However, the tender was only for amount equal to the lawfully produced oil in the commingled total. Noting that the proportion of lawfully and unlawfully produced oil was known, the Court concluded that both "justice and practical convenience will best be served by allowing a separation as is proposed. * * *. Commingling and proportionate separation is daily practiced in

the business of grain elevators, pipe lines and the like. We see no reason why the practice is not proper here." 80 F.2d at p. 469.

From the foregoing, the Commission should not misconstrue our contention as being one of denial of jurisdiction over transportation of natural gas in interstate commerce or over sales for resale in interstate commerce because of commingling of such jurisdictional gas with direct-use or interstate gas. Nor do we contend that the Commission may not, on proper facts, such as those involved in the *California* case, regulate a sale for resale in interstate commerce when the contract for such sale includes gas which may be consumed directly by the purchaser. But, when carefully tailored transactions, made in reliance upon court and commission precedents, have contractually separated jurisdictional from non-jurisdictional volumes, as Lo-Vaca has done here, the concept of fungibility provides legal basis for the conclusion that the volumes are to be treated as separate in fact.

Accordingly, we urge that the Commission expressly recognize that natural gas is a fungible commodity and accept the legal consequences which necessarily follow. In doing so, the Commission will reaffirm its own position and follow the court decisions in the cases discussed above, such as the *City of Hastings* case, the *North Dakota* case, and the *Houston, Texas-Coastal* proceedings, without derogating from its jurisdiction as determined in the *California* case.

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IV

There Is No Record Basis for a Finding That Lo-Vaca Is a Pipeline Company.

On page 10 of its Opinion, the Commission concludes that Lo-Vaca and Houston "would be pipeline companies." There is no basis in evidence for that conclusion. For, in the sentence immediately preceding its conclusion, the Commission, itself, finds that "Lo-Vaca proposes to build a system of lines which will receive the gas from the pro-

ducers, transport it and deliver it ~~at Coq~~uat, *but the record is not sufficient to determine here whether it is a 'pipeline company'* in addition to being a natural gas company and it is not necessary to do so." (Emphasis supplied.)

Accordingly, since the Commission's conclusion is contradicted by its own express finding, it is submitted that the conclusion is erroneous and should be eliminated.

V

Conclusion

Wherefore, for the foregoing reasons, it is requested that the Commission grant rehearing in these proceedings and upon rehearing take the following action:

(1) make the express findings of fact set forth in Section II above;

(2) reverse its determination that Lo-Vaca's restricted-use sale to El Paso would be subject

to its jurisdiction and hold that the sale would be a direct-use sale and, as such would not be subject to its jurisdiction; and

(3) delete its conclusion that Lo-Vaca would appear to be "a pipeline company" as being without record support.

Respectfully submitted,

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Its Attorneys

Dated at Washington, D. C.
this 22nd day of November, 1961.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Jerome K. Kuykendall, Howard Morgan, L. J. O'Connor, Jr. and Charles R. Ross.

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CI61-177
HOUSTON PIPE LINE COMPANY

Order Denying Rehearing

(Issued December 12, 1961)

Applications for rehearing were filed by Houston Pipe Line Company on November 21, 1961, and by Lo-Vaca Gathering Company and El Paso Natural Gas Company on November 22, 1961, to our Opinion No. 348 and order issued October 23, 1961, determining that we would have jurisdiction over proposed sales of natural gas to be made by Houston and Lo-Vaca to El Paso. It is alleged that the gas involved would be produced in Texas and delivered to El Paso in Texas. Contractual arrangements purported to provide that Houston's gas would be consumed in Texas by El Paso's compressor stations and a gasoline plant of Phillips Petroleum Company, while Lo-Vaca's gas would be consumed in El Paso's compressor stations outside of Texas. The record showed that Houston's and Lo-Vaca's gas would in fact be commingled with other gas in El Paso's system and would be consumed in part by El Paso either within or outside of Texas and would in part be sold to El Paso's customers in other states. The applications for rehearing do not raise points that were not fully discussed in our opinion. However, we may note the separate bases of our conclusions.

We conclude that where the specific gas sold in Texas would in part be physically transported to another state and resold, the sale in Texas would be a sale for resale in interstate commerce and subject to our jurisdiction regardless of contractual arrangements and declaration of intention by the parties that the gas is to be used in Texas or consumed by the pipeline. We adhere to this view, but even if we did not hold to it, we would still find that the sales here were subject to our jurisdiction on the separate ground stated in our opinion relating to the nature of El Paso's own system. That is, a sale of natural gas to an integrated, interstate pipeline system which uses the gas for system purposes and physically transports and resells at least part of the gas to customers in other states is a sale in interstate commerce for resale.

We may add that we are not unaware of *Peoples Natural Gas Company* v. *P.S.C.*, 270 U.S. 550, cited by the applicants for rehearing. That case, of course, concerns gas produced in Pennsylvania, delivered into an interstate pipeline in Pennsylvania and sold wholly in Pennsylvania commingled with gas brought in by the pipeline from West Virginia. The Court held that the Pennsylvania Commission had authority to order the delivery of gas from the interstate pipeline that was less in quantity than that Pennsylvania produced gas. In the *Peoples* case there was no chance that any of the gas in the pipeline in Pennsylvania could leave the state; in the present case there was no chance that part of Houston's and Lo-Vaca's gas would not be carried out of the state and sold for resale.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the applications for rehearing filed by Houston,

Lo-Vaca and El Paso set forth no new facts or principles of law which were not fully considered by the Commission when it issued its opinion and order of October 23, 1961, or which, having now been considered, warrant any modification of the said opinion and order.

The Commission orders:

The applications for rehearing of the Commission's opinion and order issued herein October 23, 1961, are hereby denied.

By the Commission. Commissioner O'Connor dissenting for the reasons set forth in Opinion No. 348 and order issued October 23, 1961.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

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Letter of December 20, 1960, to Lo-Vaca Gathering Co. from El Paso Natural Gas Co. constituting letter agreement signed by El Paso and Lo-Vaca			

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19478

LO-VACA GATHERING COMPANY,
HOUSTON PIPELINE COMPANY,
EL PASO NATURAL GAS COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Joint Petition for Review of Opinion and Order of Federal Power Commission

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SUPPLEMENTAL JOINT APPENDIX

JOINT APPENDIX

20

• • • • • • • • • • • •

Jack Ware

was called as a witness and, having been first duly sworn, was examined and testified as follows:

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Cross-Examination

By Mr. Knight:

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Q. Do you know, Mr. Ware, or will you have any way of knowing after this project gets into operation what will happen to Lo-Vaca's gas after Lo-Vaca delivers that gas to El Paso Gas Supply Company? A. No, sir, I don't. I will rely on the contract and the integrity of El Paso Natural Gas to do what the contract says.

Presiding Examiner: You are not an engineer, are you? You are a lawyer?

The Witness: I am a lawyer, yes, sir.

Presiding Examiner: Can one selling property pass title to it and still keep control, or what happens to it after?

The Witness: Once title passes that is the end of

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control as far as I know the law or the facts or anything else to be.

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John H. Wimberly

was called as a witness, and having been first duly sworn, was examined and testified as follows:

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Mr. Knight: Is he going to withdraw Exhibit 3?

Mr. Giller: Whatever you gentlemen wish. Exhibit 3 is available. You have copies of it for use, but I do not wish it to be part of the record because it is bulky and has nothing to do, I do not believe, with the issues here

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involved, except this one particular clause.

Mr. Knight: I think we ought to have the entire contract in evidence, Your Honor, if we are going to have any part of it.

Mr. Giller: It has been passed out to everybody. They have copies and they could use it for whatever questions they ask of Mr. Wimberly, sir.

Presiding Examiner: You don't have to offer it in evidence. You have had it identified. It will remain in the record as identified. If anybody discovers anything else in it they want to offer in evidence I will listen to them at that time.

I don't believe it ought to be withdrawn. I believe it should stand in the record as an exhibit offered and marked for identification—not offered, but marked for identification.

Mr. Giller: Yes, sir.

Mr. Knight: Is it part of the record if it is not offered, either accepted or rejected?

Presiding Examiner: All he is offering it for is for this one excerpt. If anybody else finds something in this that they will want to offer, I will listen to them at that time, including Staff.

* * * * * * * * * * *

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Cross-Examination

By Mr. Knight:

. . . . . .

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Q. When Houston's gas is delivered near Three Rivers, Texas, into the pipeline of the El Paso Gas Supply Company, it will be commingled with gas delivered by Lo-Vaca Gathering company, will it not,— A. Yes, sir.

Q. —in El Paso's line? A. Yes, sir, I suppose so. And maybe from other sources of supply of El Paso, yes, sir.

. . . . . .

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Presiding Examiner: Have you any familiarity with this Exhibit B as attached to your petition for declaratory judgment?

The Witness: Just generally, Your Honor, as I say.

Presiding Examiner: This Phillips shown hero, is that the so-called Seminole?

The Witness: Well, now, at one time I did—it has been sometime ago. This contract was executed and these negotiations took place prior to July 1960, and I am not sure just where the location of—I see it here.

Presiding Examiner: Keystone Field mark. There isn't a mark about Phillips gasoline plant, which is located near Goldsmith there. Is that the so-called Seminole Field?

The Witness: I do not know, sir.

. . . . . .

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By Mr. Ormasa:

Q. Mr. Wimberly, we have been speaking a good bit yesterday and today about contractual provisions. I wonder if

you would mind turning for a moment at least to some of the fundamentals of the gas business, sir.

Now, assume, Mr. Wimberly, that at a common point we receive gas from two separate sources, would it be understandable if I refer to that as source X and source Y? A. Yes, sir.

Q. And if that gas proceeded through a pipeline and part of that gas was delivered to say, shall we say, a compressor station, can you tell we whether the gas delivered at the compressor station would be gas X or gas Y or gas X-Y?

Do you understand the question? A. Yes, sir, I understand it. I think I do. Physically, you mean?

Q. Physically. A. No, sir. I think it would probably be gas X-Y.

Q. Thank you. And that is typical of the operation of the gas pipeline business, is that correct? A. I think that is true, yes. Almost any gas pipeline has gas that comes from a number of sources.

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Q. And that is what we term commingling, is that correct, sir? A. Yes, sir, that is right.

Q. And as we add the number of different sources, we then add X-Y-Z, for example, for the gas being delivered at a particular point, is that correct? A. Yes, sir.

Q. Would you answer audibly, please? A. Yes, sir.

Q. Thank you.

Now, the gas that you deliver from your system to Three Rivers, of course is commingled gas, is that correct, sir? A. Yes, sir.

Q. It comes from various sources within your overall pipeline system within the State of Texas? A. That is right.

Q. And it is delivered to the facilities, as I understand

it, or would be, the facilities to be built by El Paso Gas Supply Company, is that correct, sir? A. That is correct.

Q. And that would not be the only gas to be received at those facilities, is that correct? A. It is my understanding that is correct, yes.

Q. Do you know what other gas would be received at

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those facilities at Three Rivers? A. Well, I have heard testimony here that some will be received from Lo-Vaca.

Q. And have you heard the testimony that two different titled types of gases will be received there from Lo-Vaca? A. Yes, sir.

Q. And could you describe those two different types?

Mr. Ross: I object, your Honor.

Mr. Ormasa: I think the objection is relevant. I withdraw my question.

By Mr. Ormasa:

Q. One of those under the testimony here has been subject to a restriction and the other portion of the gas has not, is that correct, sir? A. That is my understanding, yes.

Q. And that gas is proceeding then through a pipeline or will proceed through a pipeline to be built by El Paso Gas Supply, is that correct, sir? A. Yes, sir, that is my understanding.

Q. And it is my understanding that that gas then, this commingled gas will be used to supply certain compressor stations in the State of Texas? A. That is my understanding, that that will be the physical arrangement or that is actually what will happen physically, yes.

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Q. And actually, physically, that pipeline will connect with the El Paso Natural Gas pipeline at Sonora in Texas,

is that correct? A. In West Texas. I am not sure about the exact point.

Q. Are you familiar—strike that.

I will ask you to take a look at Exhibit No. 6, if you would, please, sir? Do you have that available to you? A. I have it. I am not very familiar with it.

Q. I wonder if we might take the time to examine it together, Mr. Wimberly. A. Yes, sir.

Q. Now, you will deliver gas at a point shown in the lower right hand portion of Exhibit 6 designated as Three Rivers, is that correct, sir? A. Yes, sir.

Q. And your pipeline will physically connect, will it not, with the proposed pipeline to be built by El Paso Gas Supply, the red dotted line set forth on that exhibit? A. That is what the map shows.

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Q. And the map further shows, does it not, a physical connection at Sonora with El Paso Natural Gas Company pipe line system? A. I think it does.

Q. Does it not? Do you want to take a moment to study it, sir? A. I wouldn't know any more about it than I have just said. It seems to. This red line does not touch the green line. I assume it connects there.

Q. All right.

And that green line proceeds on and makes connections with pipelines which apparently according to this exhibit proceed into the State of New Mexico. Is that correct, sir? A. Would you repeat that, please?

Mr. Ormasa: May we have the pending question read?

(Question read)

The Witness: Yes, sir.

* * * * * * * * * * *

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Jack Ware

resumed the witness stand and, having been previously duly sworn, testified further as follows:

Cross-Examination (Resumed)

By Mr. Ormasa:

* * * * * * * * * * *

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Q. And so far as you know, when you executed the contract of March 15, 1960, had you supplied all the needs of El Paso in so far as they have requested you to fulfill them?

Mr. Ross: May I have the question read back, please?

Presiding Examiner: It will be read.

(Question read)

The Witness: Do you mean the needs for their system use? Is that your question?

Mr. Ormasa: I was thinking of the need of gas from you.

The Witness: No, sir. That was evidenced by the fact that we, at the time we had signed the March contract, that we were already negotiating on the May contract.

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Barry Hunsaker

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Cross Examination

By Mr. Ormasa:

* * * * * * * * * * *

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Q. Can you tell me what the present cost of gas is at the Phillips plant?

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Presiding Examiner: I don't believe, in the first place, this witness would be competent to answer that. In the second place, it wasn't part of his direct. And in the third place, it has its place later in the case. You have your point on the record now, I think, as to what you intended to inquire about.

Mr. Ormasa: He has testified, Your Honor, and the exhibit shows that the Phillips Petroleum Company plant will purchase Houston gas for use as fuel, and that shows in his legend up there, and it also shows in the quantity that is attached to the Phillips station. So therefore he has opened himself, it seems to me, to the question as to whether in truth and in fact Houston gas will be used there, to the extent that I have indicated. I will submit to Your Honor's ruling.

Presiding Examiner: I don't believe there has been any claim from any of the people who testified that any particular molecules of gas to be used anywhere. That is my recollection at this point. A quantity will be used there and it will come from a commingled stream which originates down here at the lower right-hand corner of this Exhibit 7.

By Mr. Ormasa:

Q. Mr. Hunsaker, you have just been listening to the Examiner. Do you accept his statements? A. Yes, sir, I do.

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Q. Thank you. Now can you tell me, Mr. Hunsaker, what present volumes of gas are used at the Phillips station? A. By Phillips, or by El Paso?

Q. By El Paso. A. The volumes shown on Exhibit 7

represent, as I recall, our actual average daily volume for the year 1959.

Q. If I could broaden the scope of the question, would that be true as to each volume shown as attached to each existing station? A. Yes, that is correct.

Q. Now you testified, Mr. Hunsaker, if I understand it correctly, that the arrows on each of these exhibits, 7, 8, 9 and 10, represent actual flow along the pipeline; is that correct, sir? A. They represent what will be the actual flow under the operation of this project.

Q I ask you to turn then to Exhibit 7. If you will note up on the New Mexico-Texas border, south of the Wasson station, a juncture just east of the border of New Mexico. A. Yes.

Q. Then the arrow to the left, or generally to the southwest, says "To Pecos River". A. Yes.

Q. Does that represent the actual direction of flow?

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Q. Does that represent the present actual gas flow at that point? A. Most generally, yes, sir.

Q. Does it flow in both directions at present? A. Not normally. It may have on rare occasions.

Q. Is the normal flow from that juncture into Pecos River area? A. Yes, that is correct.

Q. Do you have the original Exhibit 7 in evidence? Where is the original Exhibit 7?

Presiding Examiner: I think it is received in evidence. I know it is, yes.

Mr. Ormasa: Do you have it there, Mr. Examiner?

Presiding Examiner: You want a copy of it?

Mr. Ormasa: I just wondered if we could mark this point so it would be quite clear in the record. May we mark this F-1, Mr. Examiner, the point just testified to?

Mr. Ross: Just one moment, please. If we are going to

start marking up exhibits, I believe we are all entitled to have copies of the marked-up exhibits, and I would like to have that understood before the witness proceeds.

Presiding Examiner: I think we all know where the point is, Mr. Ormasa.

Mr. Ormasa: If there is no confusion I won't bother to mark it. Everyone is clear as to the juncture—you are, Mr.

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Hunsaker?

The Witness: Yes.

Mr. Ross: You are asking whether all counsel are clear on that point?

Mr. Ormasa: Yes, I would want all counsel to be.

* * * * * * * * * *

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By Mr. Ormasa:

Q. Do I interpret Exhibit 7 correctly, Mr. Hunsaker, that this gas, when it reaches Pecos River, proceeds on to Guadalupe in the State of Texas? A. Yes, that is correct.

Q. Now from what source is the gas obtained at the juncture just east of the New Mexico-Texas border? A. It is obtained from all of our sources within the State of Texas, that flow in that direction.

Q. And that, of course, would include the Houston-Lo-Vaca gas? A. Yes, it would.

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Q. Now when the gas reaches the Guadalupe station, does the 16-inch line proposed to be built from the Keystone area, will that physically connect with the five lines coming generally from the Pecos River down into Guadalupe? A. No, sir, it will not. It will connect with the fuel system at Guadalupe, and that is all.

Q. You will have two compressor stations at Guadalupe, is that correct? A. We will have two services there, not two stations. They will be in common buildings and in a common area.

Q. I don't understand too much about these technical aspects, Mr. Hunsaker. Could you explain this to me: What happens to those five lines that proceed into Guadalupe? A. They compress with the compressors at Guadalupe. They would come through the plant yard and each of them would be valved with a block valve and all of them would be manifolded on each side of the valve. They would take suction from one side, compress it, and discharge it downstream of the station block valve. Those compressors on the 16-inch line will do likewise, except that they will compress gas from that line and back into that line, only.

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Mr. Ormasa: I didn't understand that last part, Mr. Hunsaker.

The Witness: I said that those compressors which will serve the 16-inch line will operate in a similar fashion, except that they will compress gas from the 16-inch OD line back into the 16-inch OD line, only.

By Mr. Ormasa:

Q. That is, there is no physical manner by which gas could be switched from the compressor on the 16-inch line to the compressor station on the other lines?

The Witness: May I have the question read?

Presiding Examiner: Read the question, and we would like to get specifically also what location you are referring to.

Mr. Ormasa: I was referring to the Guadalupe station, Mr. Examiner.

(Question read)

The Witness: We haven't built it yet, Mr. Ormasa, so I can't answer that. It might be that we would have a common spare but it would be valved off so we could not do that.

By Mr. Ormasa:

Q. You mean it would be valved off so you would not do it, but if you wished to send it through another line, that you could do it: is that correct, sir? A. It is very hypothetical. We would not wish to do it because we would be losing a lot of pressure.

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Suppose you had one of your compressor stations down there for some reason or other, wouldn't the logical thing be to send the gas through the other compressor station? A. No, not necessarily. We will have at least a common spare on that, and it should suffice. If it doesn't, we will curtail operations as required.

Q. What do you mean by common spare? A. That is one particular engine that could be used on the 16-inch OD line, or on the California system, but not both simultaneously.

Q. So gas from either could flow through that one engine; is that correct? A. At your option, but not at the same time.

Q. In Exhibit 7, Guadalupe, where you show the two compressor stations, what is the little bracket joining the two circles that represent the compressor stations? A. There is an indicated fuel connection from the 16-inch OD line to the station.

Q. What does that fuel connection mean? What does that permit? A. That permits using gas from the 16-inch OD line for all of the fuel requirements of that station.

Q. When you refer to that station, you mean all the compressor stations there? A. I am sorry. Guadalupe. Both services, yes.

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Q. It could handle both compressors? A. Yes.

Q. Now isn't it also true that another source of gas ultimately flowing into Guadalupe starts at Keystone--I refer to Exhibit 7—starts at Keystone and proceeds to Pecos River, and then from Pecos River into Guadalupe? A. Yes, that is correct.

Q. Now that direction of flow would be just as true after the building of the 186169 as before; is that correct? A. Yes, that is correct.

Q. So physically, Houston, Lo-Vaca, and other gas you pick up in Texas would go through that line I just referred to? A. A portion of the commingled stream will do that.

Q. Now turning your attention to volumes for a moment, starting at Guadalupe, does that figure of 5,130,000 cubic feet per day, does that represent the total fuel used at the Guadalupe station? A. Yes, sir.

Q. How is that broken down between the two separate compressor stations? A. We have not broken it down, Mr. Ormasa. The service on the 16-inch OD line would use a small percentage of the total.

Q. Then if I understand you correctly, this represents

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the same volume as presently used, and just precisely how you would divide it you don't know at this time, but the lesser amount would be used for the 16-inch line? A. A far lesser amount. It would use approximately this volume every day.

Q. I don't know if I asked you this, Mr. Hunsaker, but does that volume represent the total fuel used at that station? A. Yes, sir, it does.

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Q. Can you tell me roughly what volume of gas is obtained from Lee County and is transmitted to Keystone main line station?

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Mr. Ormasa: Yes. I don't want any great precision on this. I want some idea as to what volume of gas goes from New Mexico to that Keystone plant. It could be a rough figure, an average day; whatever is easiest for the witness.

The Witness: Well, I think it could vary from nothing to 400 million a day or thereabouts. The average day may be 180 to 200 million cubic feet per day but it does vary tremendously.

By Mr. Ormasa:

Q. Is that a field line? A. I suppose you would call that a field transmission line. It is a 30-inch O.D. line that connects all of the JAL area plants to Keystone main line.

Q. Does that show on any of these exhibits? A. It shows on Exhibit 10.

Q. I wonder if you could point that out so it would be clear in the record what line that is, Mr. Hunsaker? A. Looking at the Keystone main line, there are two open circles directly north or towards the top of the flow

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diagram from the right-hand circle is a 30-inch O.D. line and you will see that identified as a 30-inch line.

That is the line that I am referring to.

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Q. Now, if I can call it to your attention, Mr. Hunsaker, there appears to be a line southerly from Eunice over

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to Fullerton. Do you see that, sir? A. There is a line from Fullerton which runs generally west of Fullerton.

Q. Is the gas flow then from Fullerton in the state of Texas, west into a point southerly of Eunice in the state of New Mexico? A. Yes, that is correct.

Q. And does that go on to Eunice station? A. Generally it does.

Q. Is part of that then part of the commingled stream that proceeds south to Pecos River station and then to Guadalupe? A. Yes, generally.

Q. Are there any other lines that in fact exist at the present time or are contemplated that cross the New Mexico-Texas border other than what we have already adverted to? A. There are some field lines that cross the border.

Q. Approximately how many are there that do that?

Presiding Examiner: Shown in Item B?

The Witness: Shown on Item B there are, I believe, three shown. There may be a very small number of others.

Presiding Examiner: This might be an appropriate time for our recess. We will take a ten-minute recess.

(Whereupon at 11:05 a.m., a recess was taken until 11:15 a.m.)

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Presiding Examiner: The hearing will be in order.

Mr. Ormasa: I believe we have a pending question, Mr. Hunsaker.

Presiding Examiner: There was no pending question.

By Mr. Ormasa:

Q. I think we were speaking about three field lines which cross the New Mexico-Texas border that we had not previously adverted to and you were about to describe those.

A. Item B by reference shows three field lines. There may be a few others.

Q. Could you set those forth in some particularity for the record, please? A. Yes. As shown on Item B by reference, there is a line which begins at the Phillips Winkler plant in Winkler County, Texas, and proceeds north up to the JAL 1 plant. There is a line in Texas which originates at Bedford in Andrews County and proceeds westerly to JAL No. 3. There is also a line which originates at the Dollarhide plant and proceeds west into New Mexico.

Q. Tell me this, Mr. Hunsaker: That Winkler line, does that go through the Keystone main line? A. No, sir, it does not.

Q. It is now in no way connected with the main line from the time it leaves the Winkler area until it reaches JAL No. 3?

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A. No.

Q. That gas then proceeds from JAL 3 as part of a common stream to Eunice, I gather, is that correct, sir? A. The Winkler line proceeds to JAL No. 1.

Q. Thank you.

JAL No. 1 rather than 3. It would then proceed from JAL No. 1 to where? A. It could go right now in two different directions. It could come back down the 30 inch O.D. line to Keystone main line, or it can go west in the 16 inch O.D. main line shown in black, which is a part of the California system as opposed to the new 16-inch line which is shown in blue.

Q. Is that one of what we have called the 5 lines? A. Yes.

Q. Under the proposal, what would be the direction of flow from JAL 1? A. It would not change.

Q. The flow would be the same? A. Yes.

Q. The Bedford gas proceeds, do I understand it correctly, northerly into New Mexico? A. Westerly into New Mexico.

353 (352)

Q. And where does that connect up with the lines running through that JAL area up to Eunice? A. The Bedford gas comes in at the JAL No. 3 plant, is

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processed and then goes into the 30-inch O. D. Sweet transfer line.

Q. What is that 30 inch Sweet transfer line? Where is that located? A. That runs north and south through the Lee County area and connects at Eunice main line station and Keystone main line station and it is the one we have referred to previously here.

Q. Now, on Item B by reference, do you have a copy of that? A. Yes, sir, I do.

Q. You have three areas that are circled, or sort of broken up as to the new facilities that are proposed to be built at the three different points, is that correct, sir? A. Yes, that is correct.

Q. Turning your attention to the Wasson station area, can you tell me, sir, what the present direction of flow is on the line shown within that circle? A. Yes. There is a single black line shown towards the bottom of the circle running generally east and west. The direction of flow on that line is from the Wasson plant to the east. It does not connect with the line that connects the Plains. The two black lines grouped together, gas from the Wasson plant to the lines that connect with Plains.

Q. That is the present flow?

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A. Yes, sir.

Q. What will be the flow of the proposed lines? A. The same.

Q. The same direction? A. Yes, sir. Now, of course, the red line will flow fuel gas back to the plant.

Q. That is what I am speaking about, the red line that

is proposed to be built. That will take gas from the—A. From the 31, or 30—I believe it is the 30-inch O.D. line, from that line back to the Wasson plant for fuel.

Q. At the same time you will be taking gas from the Wasson plant down into the main line, is that correct, sir? A. That is correct.

Q. That will be a duplicate facility then, is that correct, sir? A. Well, they would have two separate services.

Q. Wouldn't it be possible off the existing line to use the gas for fuel? A. It is now being done.

Q. Wouldn't that also be true at the other two points shown of Fullerton station and Melroy-Crane station? A. Yes.

Q. At each of those stations duplicate facilities would be built in order to physically permit gas to come off the main line to the station, is that correct?

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A. That is correct.

Q. That would be contrary to present flow? A. That is correct.

Q. And the present gas is being used now to serve those stations? Perhaps I phrased that rather poorly? A. Yes.

Q. The answer is yes or that I phrased it poorly? A. The answer is yes to the question.

* * * * * * * * * *

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Q. Now, returning to the Guadalupe Cornudas area, on Exhibit 7, what gas will be used to serve the compressor station at Cornudas? A. The gas from the proposed 16 inch O.D. line which we will identify as gas purchased from the Houston Pipe Line Company.

Q. Will any of the five-inch line gas be used at that

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point?

Let me ask you this: Is there presently a compressor station there? A. Yes, sir, there is.

Q. And the five line—let me rephrase that.

The gas coming out of the Pecos River area presently services that compressor station, is that correct, sir? A. Yes.

Q. Are you going to use instead of that gas the gas from the 16-inch line to service that station? A. Yes.

Q. It will be the same compressor station? A. Yes.

Q. Therefore, the lines coming from Pecos River will physically connect at Cornudas compressor station? A. Yes.

Q. It will be possible for you to use the gas coming down from Pecos River area if you desire. A. As fuel.

Q. Yes. A. We could if we were a mind to do that.

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Q. Do I understand correctly from Exhibit 9 that 384 million cubic feet per day will be proceeding from Eunice down to the Pecos River station in New Mexico? A. Yes.

Q. And the Source of that 384 million will be a commingled supply, some of which originally came from Texas and some of which came from New Mexico, is that correct, sir?

Mr. Horning: I will object to this. We have been over

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this all morning about where the source of the gas is at Eunice and how it gets down into the point of the five lines. There must be, I respectfully submit, an end to this kind of cross-examination.

Mr. Ormasa: I am merely asking, Your Honor, whether this specific volume, this figure set forth here, is tied to those two various sources that I mentioned. It is a very broad general question I think.

Presiding Examiner: What do you want to prove by that?

Mr. Ormasa: I want to prove that we have Texas and New Mexico gas proceeding through New Mexico back into Texas.

Presiding Examiner: Why don't you ask that question?

Mr. Ormasa: I will accept the modification, sir.

By Mr. Ormasa:

Q. Would you care to answer that question? A. I feel sure that from time to time we have had Texas gas come into Eunice and go southwest to Pecos River station.

Q. That will be true in the future, will it not? A. It may or may not. It depends on the production in that particular area, which is quite a variable thing.

Q. You are not going to change the direction of the gas flow coming down from that juncture near southwesterly of Plains? A. That is correct.

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Q. It is correct that you will not change that at all? A. That is correct. We will not change the flow from what we propose in these exhibits.

Q. So you will be receiving gas from Texas and New Mexico which will proceed down back into Texas, is that correct, sir?

Mr. Horning: I object to that. That is the same question that Your Honor asked to be reframed. It was reframed and answered.

Presiding Examiner: I think the answer is obvious on the record.

Mr. Ormasa: Very well, Your Honor.

By Mr. Ormasa: Now, this will help things, Mr. Hunsaker. I want to kind of trace the various gases coming into Guadalupe and I want to tie that into what you show in

357 (361)

Exhibit 9. At Guadalupe station you will receive gas coming down from Eunice as shown on Exhibit 9? A. Yes.

Q. You will further receive gas at Guadalupe flowing through what we have called the Five Lines running generally from southern New Mexico north of Keystone, westerly across New Mexico and back into Guadalupe, is that correct, sir? A. Yes.

Q. And the capacity of those lines is as you have

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indicated on Exhibit 9—would you read those figures for the record, please? A. Exhibit 9 shows in the top three lines, 1184.3 million cubic feet per day. In the bottom two black lines, 129.98 million cubic feet per day.

Q. Does the figure shown coming from Eunice comprise a part of that total which you have just referred to? A. Yes. The totals I gave you were downstream at Pecos River and the Eunice gas comes in upstream of Pecos River.

Q. That would be all supplies then coming through New Mexico, is that correct, sir? A. Yes.

Q. Then coming up from Keystone you have the proposed 16 inch line which would bring in another what, 100 million cubic feet roughly per day? A. Yes, Exhibit 9 shows 109.31 million cubic feet per day.

Q. Now, until the line shown in blue on Exhibit 9 that is the line proposed of 18616, is actually physically built, gas will not proceed in the—the source of gas at the stations as shown on Exhibits 7 and 8, would not be the source of gas as you have shown it there, is that correct, sir?

Do you want the question read, Mr. Hunsaker?

The Witness: I think so. It was a little confusing.

(Question read.)

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The Witness: I think the question is still a little confusing to me, but I believe I understand what you are get-

ting at and the answer is until the 16-inch O.D. line is built then, of course, the only gas Guadalupe will see is the gas through the 5 lines that you have referred to this morning.

By Mr. Ormasa:

Q. The 18616 line has not been certificated? A. That is correct.

Q. In fact, no hearings have been held, is that correct, sir? A. That is correct.

Q. And no hearings are set at the present time insofar as you know? A. That is correct.

Q. And this proposal has been pending some two years or so, is that correct, sir? A. I am afraid so.

Q. Now, in that regard the proposal to build the 18616 line was not part of the original application, is that correct, sir? In 18616. A. No, it was not.

Presiding Examiner: I think you better specify what application. There are three or four, I think.

Mr. Ormasa: Was not part of the original application in

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18616?

By Mr. Ormasa:

Q. You so understood that, is that correct? A. Yes, and the answer is, it was not.

Q. As a matter of fact, it appeared for the first time as part of the fourth supplement to that application, is that correct, sir? A. That is correct.

Q. And that was in what—July, 1960, or thereabouts? A. That sounds about right.

. . . . . .

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Q. Mr. Hunsaker, we have been around this point all day, really, but isn't it a fact that every time you, in your Exhibits 7, 8, 9 and 10, you assume that certain gas, such as Houston gas, or Lo-Vaca gas; you have labeled it in your

exhibits and somewhat in your testimony that that actual gas will be used there. That is based on the assumption that—let me reframe that.

As a matter of physical fact, the gas that will be delivered at each of those points will be commingled gas; is that correct, sir? A. Yes. That is true I guess in all cases except, of course, Coquat and Sonora. It is commingled only to the extent that Lo-Vaca and Houston are commingled. Beyond that point it is commingled to that extent as well as to the additional extent of commingling with other Texas-produced gas.

Presiding Examiner: And including some New Mexico-produced gas beyond Pecos River and beyond Eunice?

The Witness: Yes, to the extent that gas flows south to Eunice, it would then blend with New Mexico-produced gas.

* * * * * * * * * * *

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By Mr. Knight:

Q. Inviting your attention to Item B, which is a system map of El Paso Natural Gas Company, I invite your attention to transcript page 160, and I will ask counsel to be kind enough to supply you with a copy of that.

Beginning with line 16, you refer to Houston Exhibits 9 and 10, and I believe that you explained in our previous session that Item B shows El Paso's facilities further west than are shown on Exhibits 9 and 10. In other words, Item B carries El Paso facilities clear on west to the Pacific Coast, and the California border; that is correct, is it not?

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A. Yes.

Q. Inviting your attention to transcript page 160, beginning with line 8, you say that the flow of gas will be continuous and downstream at all points from the source to its points of ultimate consumption within the State of Texas.

Now, that would apply also to the flow of El Paso's gas throughout the entire system, west, to California, would it not? A. Yes, the flow would be continuous and downstream.

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Q. Now, all of El Paso's existing facilities which are shown on the Exhibits 6, 7, 8, 9 and 10 are now using gas as fuel, are they not? A. Yes, sir, they surely are. I was just checking, Mr. Knight, to see if there was any exception. We do have a few electric compressors, but I don't believe any were shown on 6, 7, 8, or 9. A portion of the Leupp station is electric.

Q. But the exceptions are minor and very few? A. Definitely so.

Q. No change is proposed in that regard? A. No.

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[Exhibit No. 11]

EL PASO NATURAL GAS COMPANY
EL PASO, TEXAS

December 20, 1960

Address Reply To:
1006 Main Street—Room 19
Houston 2, Texas

Lo-Vaca Gathering Co.
Petroleum Tower
Corpus Christi, Texas

Gentlemen:

Reference is made to the Gas Purchase Contract dated May 16, 1960, between El Paso Natural Gas Company, as Buyer, and Lo-Vaca Gathering Co., as Seller, covering the purchase of gas in South Texas. Said contract is hereinafter called the "May 16, 1960 Contract."

Section 1 of Article II and Section 2 of Article XIV of the May 16, 1960 Contract are hereby amended by increasing the quantity of natural gas reserves dedicated to El Paso by two hundred forty (240) billion cubic feet, for a total dedication of six hundred forty (640) billion cubic feet. Section 2 of Article XIV is further amended by the substitution of the figure "eighty million (80,000,000)" for the figure "fifty million (50,000,000)."

The price to be paid by El Paso per one thousand (1,000) cubic feet for such additional two hundred forty (240) billion cubic feet of natural gas shall be the same price as provided for in Section 1 of Article X of the May 16, 1960 Contract, except as hereinafter provided. Lo-Vaca has advised El Paso that it has experienced difficulty in purchasing gas at its present prices to meet its obligations under the May 16, 1960 Contract, and that it desires to offer its gas producers a price escalation of up to two cents (2c) every four (4) year period rather than one cent (1c) every four (4) year period. El Paso therefore agrees that the price for such additional two hundred forty (240) billion cubic feet shall be adjusted to compensate Lo-Vaca for any such additional cost of gas, but in no event shall the price to be paid by El Paso be more than twenty-two cents (22c) during the first four (4) years, with increases of two cents (2c) for each four (4) year period thereafter.

Both El Paso and Lo-Vaca are in agreement that such additional two hundred forty (240) billion cubic feet of

* * * * * * * * * *

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gas may be sold and used outside of the State of Texas in interstate commerce. However, if prior to the acceptance of a Certificate of Public Convenience and Necessity by both parties there becomes available an intrastate market or use for this gas, El Paso agrees to allocate such additional two hundred forty (240) billion cubic feet of gas for such intra-

state market or use. It is expressly recognized that in any event such additional gas will be commingled in El Paso's pipeline system with the other gas being transported therein.

This agreement shall be effective as of the date hereof and shall remain in full force and effect for a term concurrent with the term of the May 16, 1960 Contract.

As hereby supplemented and modified, the May 16, 1960 Contract shall continue in full force and effect in accordance with the terms thereof.

If the foregoing correctly states Lo-Vac's understanding concerning the matters covered herein, it is requested that your Company indicate its acceptance hereof and agreement hereto by executing two of the enclosed copies of this letter in the space provided below and returning such executed copies to El Paso.

Very truly yours,

EL PASO NATURAL GAS COMPANY
By /s/ D. H. TUCKER
D. H. Tucker, Vice President

ATTEST:
By /s/ V. M. PLUMMER
V. M. Plummer,
Assistant Secretary

(Corporate Seal Affixed)

ACCEPTED AND AGREED TO:
LO-VACA GATHERING CO.
By /s/ O. S. WYATT, JR.
President

ATTEST:
By /s/ ELLIS M. BROWN
Secretary

(Corporate Seal Affixed)

382 *Minute entry of argument and submission—January 7, 1963*

[Omitted in printing]

383 In the United States Court of Appeals for the Fifth Circuit

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

versus

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

Opinion—September 24, 1963

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge

CAMERON, *Circuit Judge:* The question here involves solely the extent of the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act.[1]

384 The facts underlying the controversy presented by this petition for review of an order of the Federal Power Commission are not in dispute and are, briefly, as follows:

Lo-Vaca Gathering Company (Lo-Vaca) requested certificate authority with respect to two contracts involving the delivery of natural gas to El Paso Natural Gas Company (El Paso). The first request involved the "gathering and delivery" to El Paso of 50,000 Mcf (meaning, thousand cubic feet) of natural gas per day, and the second involved the "gathering

[1] The section outlining jurisdiction is 15 U.S.C.A. § 717(b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, *to the sale in interstate commerce of natural gas for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [Emphasis added.]

and sale" of 70,000 Mcf per day. Authority requested under the first contract is thus limited to the "gathering and delivery" rather than the sale of the gas. Petitioners contend that regulation of the *sale* is not within the Commission's jurisdiction under the Act because that volume of gas is not to be resold. The contract provides:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system." Ju-
> 385 risdiction is not disputed as to the second Lo-Vaca contract.

Houston Pipe Line Company (Houston) proposes to sell to El Paso 70,000 Mcf of natural gas per day to be consumed wholly within the State of Texas. The contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas."

It is not necessary here to outline the complicated routing of the gas through El Paso's multiplex lines. It is enough to say that, in each instance, petitioners propose to meter into the system, in Texas, the specified volumes of gas; that this gas will be commingled with gas already in the lines (which gas is admittedly "jurisdictional"); that other gas will later be put into the lines; and that, at the points described in the quoted clauses of the contract, an equal volume of gas will be withdrawn for "non jurisdictional" use. The Commission does not claim that the physical inmetering—out-metering will not be faithfully consummated just as the contracts provide; rather, it argues that as a matter of physical reality the gas withdrawn will not be "non jurisdictional" gas because it will not be the *identical* gas metered into the lines under the contracts.

More quickly to delineate the issue drawn here, it
386 should be noted that the Commission admits, as it must, that if the volumes under consideration were in some manner physically segregated it would not and could not claim jurisdiction over the sales. The Houston sale would not be

subject to the Commission's jurisdiction because it would not be a "sale in interstate commerce;" and the Lo-Vaca sale, though in interstate commerce, would not be "for resale." 15 U.S.C.A. § 717(b). See, *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 1947, 332 U.S. 507. The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is, but the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its "non jurisdictional" status.

We hold that it does not. Gas is gas, and borrowing the words of Judge Brown, in connection with a different petroleum problem, "* * * the principles of constitutional law and statutory construction are not equated with laws of physics, so that the inquiry is something more than the schoolboy's quest for molecular identification." *Deep South Oil Co. of Texas* v. *Federal Power Commission*, 1957, 5 Cir., 247 F. 2d 882, 891 (dissenting opinion).

First, we may discuss what is *not* involved. No ques-
387 tion of constitutional limitations under the Commerce Clause need be considered. The Commission's jurisdiction under § 717(b) is not so broad as the scope of the federal power under Art. 1, Sec. 8, Cl. 3 of the Constitution. Its jurisdiction over the sale of natural gas is limited:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. * * *
>
> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern*

Pipe Line Company v. *Public Service Commission of Indiana*, *supra* at 516, 517.

And, as we have said, the sales would admittedly be "non jurisdictional" if the gas so sold were not mixed and commingled with other gas which was to be resold in interstate commerce. So the question is more finely drawn: if the gas metered out for "non jurisdictional" use will not be
388 made up of the identical molecules as the gas so metered in, does the Commission thereby gain jurisdiction of the sale? Petitioners rely principally on two cases from the courts of appeal [2] to support their theory of "fungibility" or "separation by contract." These cases, in turn, rely on the language of *United States* v. *Public Utilities of California*, 1953, 345 U.S. 295. The *Public Utilities of California* case is the starting point.

The Navy contracted with California Electric Power Company to purchase electrical energy in California for the Navy's use [3] in Nevada. Delivery of the power was made at a substation about twenty-five miles from the Nevada line. The Power Company argued that jurisdiction of the Commission attached only to that portion of the energy resold by the Navy. Assuming *arguendo* that the energy could be so divided for jurisdictional purposes, the Court said that such separability "would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable . . . . But there is no record evidence of separate rates, separate contracts or separate rate regulation by official bodies: in short, that the 'sales' themselves were separate * * *", pp. 317–318. The petitioners here have carefully tailored their transactions to fit the above *caveat*.[4]
389 *City of Hastings* v. *Federal Power Commission*, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420 (1955) involved a situation strikingly similar to the Lo-Vaca proposal: The City entered into two contracts with a supplier for the purchase of gas. One contract involved gas to be resold by the City and the other involved gas to be used by the City

[2] North Dakota v. Federal Power Commission, 1957, 8 Cir., 247 F. 2d 173; City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420.

[3] The Navy consumed some of the power and resold another portion.

[4] Pennsylvania Water and Power Co. v. Federal Power Commission, 1952, 343 U.S. 414 is inapplicable. That case did not involve separate transactions, etc.

in its power plant. The gas came from out-of-state sources and was thus a "sale in interstate commerce." The gas sold under both contracts was delivered to the City in a commingled stream and, in holding the not-for-resale sale "non jurisdictional", that court said:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocations of gas and effective separate measurement facilities." [P. 36]

The situation in *North Dakota* v. *Federal Power Commission*, 8 Cir., 1957, 247 F. 2d 173, was very much like that involved here under the Houston contract. There, Montana-Dakota Utilities Company entered into two contracts for the purchase of gas for sale in intrastate market and two contracts for the purchase of gas for the interstate market. Gas under all four contracts was delivered to Montana-Dakota in a commingled stream at one delivery point in North Dakota. Some of the gas was then resold in North Dakota and attributed to the intrastate purchase contracts. The ques-
390 tion phrased by the court was: "* * * does natural gas produced, wholesaled, transported, and sold for immediate consumption, solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce * * *?" [P. 176] The court concluded:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' [intrastate sales] contracts are easily identifiable and determinable."

We think the rationale and holdings of these cases are controlling here.[5]

[5] In both North Dakota and Hastings, the Commissioner disavowed jurisdiction, taking a position directly contrary to that taken here. E.g., a

391 The Commission here seeks to distinguish *Hastings* and *North Dakota* by the fact that, in those cases, all the gas sold was supplied by the same seller, whereas here El Paso is supplied by many sellers other than Lo-Vaca and Houston. It argues that to allow El Paso to "pick and choose" the suppliers of the "non-jurisdictional" quantities needed would be to allow the purchasing pipeline to discriminate between its various suppliers. The question, however, is whether the gas is effectively segregated by the device of a contract, rather than some physical barrier; and, therefore, the question of discrimination is irrelevant, insofar as the intial sales jurisdiction is concerned, if regulation of the sales is not within the jurisdiction of the Commission. If the gas could, in some manner, be transported in a physically segregated manner, jurisdiction would not attach; under the rationale of *Hastings* and *North Dakota*, and the language of *United States* v. *Public Utilities*, contractually-segregated gas is not jurisdictional; it must follow that discrimination *vel non* is not a proper area of inquiry. We can see no difference in the controlling legal principles here, even though the facts are somewhat different, as they are in almost all cases.

Neither is the question whether the expenditures are reasonable and prudent, and thus includable in the pipeline's cost of service for rate computation purposes, before us here.

392 Nor is there before us any question as to *transportation*, rather than *sale*, certificate authority.

The Commission's position ignores the nature of natural gas. Gas in a pipeline can be separated only "on paper" or conceptually, or, at least, this is the cheapest and most practi-

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passage from the Commission's brief in North Dakota (before this court by agreement):

"For those decisions make it plain that the indistinguishable commingling of jurisdictional and non jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale, with other gas (or electricity) not delivered in interstate commerce or not for resale, it is necessary for the Commission to determine 'whether (or not) an essentially separate transaction (for the non-jurisdictional delivery) • • • is identifiable'. United States v. P.U.C. of California, 345 U.S. 295, 318. The decisions spell out the principles upon which the Commission here rightly concluded that transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate."

cal way to do it.[6] Gas lines *transport* gas for others, and we doubt that the owners are ever delivered the identical molecules turned over to the carrier. As we have said, gas is gas. The concept of separate identity, by volume, is not new. This Court, in a "hot oil" case, recognized that contraband oil commingled with lawfully produced oil could not be separated, as a physical fact. We concluded that both "justice and practical convenience would be served by allowing a separation as is proposed [proportional separation] . . . Commingling and proportional separation is daily practiced in the business of grain elevators, pipe lines, and the like. We see no reason why the practive is not proper here." *Federal Tender Board No. 1* v. *Haynes Oil Co.*, 1935, 80 F. 2d 468, 469.[7]

393 We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional gas. Their plea should be made, however, to Congress and not us. The courts are not competent to make legislative decisions as to whether jurisdiction *should* be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them.

In closing, we must comment on the Commission's assertion that petitioners "beg the question" by stating that the sales are not "jurisdictional" because, as a matter of fact, most of

[6] Must petitioners be driven to the unnecessary expense of constructing a parallel line to carry the "non-jurisdictional" gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation.

[7] *See also Humble Oil and Refining Company* v. *Texas and Pacific Ry. Company*, 1955, Sup. Ct. Tex., 289 S.W. 2d 547, 552: "The fact that humble was also shipping from New Mexico should not change the character of its shipments originating in Texas. Accordingly, we hold that the oil produced in and shipped from New Mexico to East Texas takes an interstate rate and the oil produced in West Texas and shipped to East Texas takes an intrastate rate, and this irrespective of its being commingled with other oil enroute."

the gas molecules put into the lines are sold in interstate commerce and will be resold. As we see it, this is not begging the question but is merely stating it. We hold that such gas is not "resold" in interstate commerce, because it is contractually segregated and is either consumed by the pipeline itself, or resold in Texas.

It is clear, moreover, that all of the gas it *not* sold for resale in interstate commerce. It must follow that, if those volumes of gas can be segregated, the Commission has no legitimate interest in the sale of that amount of gas. The method of segregation used here seems to be the most practical
394 one. No one has suggested to us any reason why the mixing or commingling of this gas with other gas hampers the regulation of sale of the "jurisdictional" gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consummation of these plans. The substance of the proposals is that "non jurisdictional" gas will honestly be used for "non jurisdictional" purposes. Congress' refusal to give jurisdiction over such sales, assuming it has the constitutional power to do so, should not be thwarted because of the physical nature of natural gas.

The petition for review is granted; the petitioners' request that the Commission's order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption, be set aside is granted and the case is remanded for disposition not inconsistent with this opinion.

ORDER VACATED.

RIVES, Circuit Judge, dissenting:

As shown in 15 U.S.C.A. § 717(b), quoted in footnote 1 to the majority opinion, the Commission has jurisdiction of (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural gas companies engaged in such transportation or sale." The questions for decision are whether
395 the Commission has jurisdiction over proposed sales of natural gas by Lo-Vaca and by Houston to El Paso.

The controlling facts as found in the opinion of the Commission are as follows:

> "Lo-Vaca * * * at present owns no facilities and engages in no operations. By a contract dated May 16,

1960. Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf. There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

"'All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, 396 that said gas will be commingled with other gas being transported in El Paso's pipe line system.'

"Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

"* * * Since 1925, it [Houston] has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢ plus certain taxes for each unit of one million btu. The contract contains rather

elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, 'El
397 Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas.' El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

"The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's
398 Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

"El Paso proposed * * * to supply its main-line compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to

West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

"Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6.091 M²cf per day and on a maximum day would exceed the supply by 31.879 M²cf per day.

To give some semblance of physical delivery of
399 Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

"The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21.373 M²cf per day on an average day and by 36.549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California."

Thus Houston's and Lo-Vaca's respective contracts with El Paso attempt to restrict the use of the gas to nonjurisdictional purposes, and provide, on the principle of "fungibility" that if their gas is not in fact used for the contractually stated nonjurisdictional purpose, an equal volume of gas supplied by some other supplier will be so used. The Commission refused

to let its jurisdiction turn upon the provisions of con-
400 tracts that do not correspond and are not intended to correspond to reality. I agree with the Commission.

Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas. This Court so held in *Deep South Oil Co.* v. *F.P.C.*, 5 Cir. 1957, 247 F. 2d 882, and its companion case, *Shell Oil Co.* v. *F.P.C.*, 5 Cir. 1957, 247 F. 2d 900. In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g.*, *Sprout* v. *South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR* v. *Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co.* v. *Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co.* v. *Power Comm'n*, 1945, 324 U.S. 515, 529: "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."

A detailed discussion of the facts of the cases relied on by the majority would unduly prolong this opinion. Carefully considered, I submit that none of those cases permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional seller into the particular "restricted" use. In no previous case has jurisdiction been permit-
401 ted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality.

The Commission's jurisdiction over the proposed sales of natural gas by Lo-Vaca and by Houston to El Paso is much more clear than its jurisdiction sustained in *United Gas Pipe Line Company*, Opinion No. 401 of the Commission issued August 26, 1963.

I respectfully dissent.

402 In the United States Court of Appeals for the Fifth Circuit

October Term, 1962

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

versus

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge

Judgment—September 24, 1963.

This cause came on to be heard on the Petition of Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, for review of an order of the Federal Power Commission issued on October 23, 1961 in Docket Nos. CI60-693, et al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted; the petitioners' request that the Commission's Order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption be set aside is granted; and that this cause be, and it is hereby, remanded to the Commission for disposition not inconsistent with the opinion of this Court.

RIVES, *Circuit Judge*, dissents.

Issued as Mandate:

403 [File endorsement omitted]

406 No. 19478

In the United States Court of Appeals for the Fifth Circuit

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

vs.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Petition for Rehearing En Banc—filed October 14, 1963

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Come now the People of the State of California and the Public Utilities Commission of the State of California (California), intervenors, and pursuant to Rule 29 and Rule 25a of the Rules of the United States Court of Appeals for the Fifth Circuit, respectfully request rehearing *en banc* of this Court's decision of September 24, 1963, in the above-entitled proceeding, which was to review an order of the Federal Power Commission (Commission).

407 As ground for rehearing *en banc* California respectfully represents:

That the Court erred in concluding that an interstate stream of natural gas, destined for an interstate market, may be segregated by means of private contracts designed to make it appear that a portion of the whole interstate stream is nonjurisdictional, and thereby to remove such portion from the regulatory authority of the Commission.

Respectfully submitted.

RICHARD E. TUTTLE,
Chief Counsel.
J. CALVIN SIMPSON,
Senior Counsel.
JOHN T. MURPHY,
Associate Counsel.

October 11, 1963

CERTIFICATE OF COUNSEL

I, J. Calvin Simpson, do hereby certify that the within Petition for Rehearing En Banc, on the ground specified, is presented in good faith and not for delay.

Dated at San Francisco, California, this 11th day of October, 1963.

J. CALVIN SIMPSON.

Attorney for the People of the State of California and the Public Utilities Commission of the State of California.

467 [254] Cameron

In the United States Court of Appeals for the Fifth Circuit

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

SOUTHERN CALIFORNIA GAS COMPANY, ET AL, INTERVENOR-RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

Order Denying Petition for Rehearing—December 17, 1963

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge

PER CURIAM:

This cause coming on for hearing upon the petition for rehearing filed on behalf of the Respondent Federal Power Commission, together with motion for rehearing by the Court en banc, joined in by Southern California Gas Company et al as Intervernor-Respondents, and the Court having considered the same and the briefs filed in support and in opposition thereto, it is ordered and decreed that the said petitions for rehearing and also the motion for rehearing en banc be, and they hereby are, DENIED.

"RIVES, *Circuit Judge*, dissents."

468 [Clerk's Certificates to foregoing transcript omitted in printing.]

469 Supreme Court of the United States
October Term, 1963

No. —

FEDERAL POWER COMMISSION, PETITIONER

vs.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS CO.

Order extending time to file Petition for Writ of Certiorari—March 10, 1964

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1964.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 10th day of March, 1964.

470 Supreme Court of the United States

October Term, 1963

No. 914

PEOPLE OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS

vs.

LO-VACA GATHERING COMPANY, ET AL.

Order Allowing Certiorari—June 1, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 915 and 990 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

471 Supreme Court of the United States

October Term, 1963
No. 915

SOUTHERN CALIFORNIA GAS COMPANY, ET AL., PETITIONERS

vs.

LO-VACA GATHERING COMPANY, ET AL.

Order Allowing Certiorari—June 1, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 914 and 990 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

472 Supreme Court of the United States

October Term, 1963
No. 990

FEDERAL POWER COMMISSION, PETITIONERS

vs.

LO-VACA GATHERING COMPANY, ET AL.

Order Allowing Certiorari—June 1, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 914 and 915 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1964

Office-Supreme Court, U.S.
FILED
MAR 12 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 46

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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March 12, 1964

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the proceeding entitled *Lo-Vaca Gathering Company, et al. v. Federal Power Commission*, No. 19478, on September 24, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., *infra*, pp. 1-15) is reported at 323 F.2d 190 (5th Cir. 1963). The opinion

and order of the Federal Power Commission (R. 254-77) are reported at 26 FPC 606 (1961), and the Federal Power Commission's order denying rehearing (R. 332-34) is reported at 26 FPC 840 (1961). The decision of the Presiding Examiner (R. 204-37) is reported at 26 FPC 617 (1961).

JURISDICTION

The judgment of the Court of Appeals reversing the Federal Power Commission's orders was entered on September 24, 1963. (App. B., *infra*, p. 16). The order of the court denying petitions for rehearing was issued December 17, 1963. (App. C, *infra*, p. 18). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 19(b) of the Natural Gas Act, 15 U.S.C. Sec. 717r(b).

QUESTION PRESENTED

The question is whether an interstate stream of natural gas, destined for interstate markets and subject to the regulatory authority of the Federal Power Commission, may be contractually segregated so as to make a portion of that stream appear to be nonjurisdictional, and by this fiction remove such portion from said regulatory authority.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended 15 U.S.C. Sections 717-717w, are set out in Appendix D, *infra*, pp. 19-25.

STATEMENT

A. Proceedings Before the Federal Power Commission.

On March 15, 1960, El Paso Natural Gas Company (El Paso) one of the nation's largest interstate pipeline companies, and the principal supplier of natural gas to the California market, contracted with Lo-Vaca Gathering Company (Lo-Vaca) for the purchase of a supply of natural gas from the Gulf Coast area of

the State of Texas. (R. 129-53). The contract purports to restrict El Paso to utilize the gas "solely as a fuel in El Paso's compressors, treating plants, boilers, camps and facilities located outside the State of Texas." (R. 149). The contract provides for an initial price of 22 cents per Mcf. (R. 141-42).

On July 19, 1960, El Paso contracted with Houston Pipe Line Company (Houston) to purchase gas also produced in the State of Texas. (R. 75-112). This contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas." (R. 78) Under a cost-of-service formula, the contract calls for an initial price of approximately 19.5 cents per Mcf. (R. 94-95).

Pursuant to Section 7 of the Natural Gas Act[1], Lo-Vaca, on June 1, 1960, applied to the Federal Power Commission (Commission) for a certificate of public convenience and necessity to gather and deliver its natural gas to El Paso. (R. 121-79). Lo-Vaca claimed the sale itself was nonjurisdictional.[2] On December 27, 1960, Houston filed a petition for a declaratory order under Section 16 of the Act[3] for the purpose of removing uncertainty as to the jurisdiction of the Commission over its sale to El Paso. (R. 179-96).

The Commission consolidated Lo-Vaca's application and Houston's petition for the limited purpose of resolving the questions of jurisdiction. (R. 201-3).

Hearings were conducted before a presiding examiner on March 21-22, 1961, and April 10, 1961. (R. 19-71). The People of the State of California and the Public Utilities Commission

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1. 52 Stat. 824, 15 U.S.C. Sec. 717f (App. D., pp. 21-24)

2. Lo-Vaca's application covers two contracts. The second contract, dated May 16, 1960, is conceded to be a sale in interstate commerce for resale, and is not involved in this review.

3. 52 Stat. 830, 15 U.S.C. Sec. 717o (App. D., pp. 24-25).

of the State of California (California), petitioners herein, intervened. (R. 197-200). Also intervening were El Paso and Transwestern Pipe Line Company (Transwestern), and Southern California Gas Company and Southern Counties Gas Company of California, and Pacific Gas and Electric Company. Transwestern, like El Paso, is an interstate pipeline company; the other companies are local natural gas distributing companies serving residential and industrial consumers within the State of California.

B. The Presiding Examiner's Decision.

The initial decision of the presiding examiner was issued on August 11, 1961. (R. 204-37). The examiner found (1) that the Lo-Vaca sale to El Paso would be a sale for resale in interstate commerce and subject to the Commission's jurisdiction even though the contract provided that the gas would not be resold by El Paso when transported outside the State of Texas, and (2) that the Houston sale would not be a sale for resale in interstate commerce subject to the Commission's jurisdiction even though the Houston gas would be commingled with other gas admittedly moving in interstate commerce for resale.

Lo-Vaca's position before the Commission was that its sale, conceded to be in interstate commerce, was a "direct" sale to El Paso and was not a sale for resale within the meaning of Section 1(b) of the Natural Gas Act.[4] (R. 211). Houston argued that under its contract gas would be consumed entirely within the State of Texas and thus, even if resold by El Paso, the sale would not be one for resale in interstate commerce. (R. 211-12). El Paso supported the positions of Lo-Vaca and Houston.

The examiner found, as the parties agreed, that the Lo-Vaca and Houston gas would be physically commingled in El Paso's interstate transmission system, and that some part of the gas "inevitably would be *physically* transported in interstate com-

4. 52 Stat. 821, 15 U.S.C. Sec. 717(b) (App. D., p. 19).

merce for resale in interstate commerce by El Paso for ultimate consumption in California * * *". (R. 210-11). The only "segregation" of the gas, the examiner found, was by contract language. The contracts provided not for the physical separation of the gas from other gas in the stream, but only for the metering of the gas at the points of entry into the commingled interstate stream and the taking out of at least the amounts so metered at specific plants in the State of Texas or at any El Paso facility outside Texas. (R. 219-21).

In Lo-Vaca's case the examiner concluded that, in view of the commingling, some or all of Lo-Vaca's gas would be in fact resold and that, this being so, Lo-Vaca and El Paso could not remove themselves from the Commission's jurisdiction by the contractural artifice that El Paso always consume in its facilities outside the State of Texas an amount of gas at least equal to that purchased from Lo-Vaca. The examiner found Commission jurisdiction over the Lo-Vaca sale to El Paso.

In Houston's case the examiner concluded that the gas was produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas. Because the gas was not commingled with any gas from outside the state, but moved with Texas produced gas only, no interstate commerce was involved. (R. 224-26). Consequently, the examiner ruled against Commission jurisdiction in the Houston instance.

California, among others, filed exceptions to the examiner's decision. California's exceptions were directed to the examiner's failure to find that the Houston sale was also subject to the Commission's jurisdiction. (R. 238-53).

C. The Commission's Opinion.

On October 23, 1961, the Commission issued its Opinion No. 348 (R. 254-77) reversing that part of the examiner's initial decision pertaining to the Houston sale, and finding jurisdiction over Houston as well as Lo-Vaca.

The Commission stated the question presented as "whether contractual arrangements and the intentions of the parties can segregate Lo-Vaca's and Houston's gas sold to El Paso from other gas received by El Paso regardless of physical commingling, the actual destination of the gas, and the operations of El Paso's system." (R. 262). In answering this question in the negative, the Commission found that the Lo-Vaca and Houston gas would actually in part be resold to customers outside the State of Texas inasmuch as the record showed it was physically impossible to restrict the use of this gas to certain facilities as was the intention of the contracting parties. The Commission held both sales to be sales in interstate commerce for resale within the meaning of Section 1(b) of the Natural Gas Act.[5]

The Commission first considered the reality of the commerce involved:

> "It is the 'nature of the beast' not the label that is controlling. It has been held that whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract." (R. 266).

The facts, as viewed by the Commission, demonstrated that the character of the Lo-Vaca and Houston sales was indeed essentially interstate commerce:

> "El Paso is engaged in an enterprise extending from Texas to California and from Mexico to Canada. The record in this case shows that its gas produced or purchased in Texas goes to a number of possible destinations. Some is consumed in Texas, but most of it is transported out of the state in El Paso's pipeline system to be consumed in pipeline facilities or resold in New Mexico, Arizona or California. The contractual provisions, of course, do not alter these physical facts. Neither is the situation altered by El Paso's proposal to build a 16-inch line west from its Keystone compressor station so that there would be a line wholly in Texas by

5. 52 Stat. 821, 15 U.S.C. Sec. 717(b) (App. D., p. 19).

which fuel could reach its Texas compressor stations, for the Houston gas commingled with other gas in El Paso's main line would physically move out of Texas although some portion might travel through the proposed 16-inch line.

"The way in which El Paso operates its system in transporting its gas from the sources of supply to the points where it is needed as discussed in part above, demonstrates that the system must be considered as a whole and that it has the primary purpose of moving gas from the Permian Basin and other sources to consumers in a number of states." (R. 267-68).

The Commission concluded that a sale of gas to El Paso's interstate system, to be used for system purposes and in part to be sold for resale outside the State of Texas, was within its jurisdictional authority. The Commission added: "The gas to be sold to El Paso by Lo-Vaca and Houston would be isolated only by terms of the contracts but actually would become system gas along with gas of other producers who did not receive this contractual treatment." (R. 268).

The Commission relied primarily upon *Oklahoma Natural Gas Co.*, 23 FPC 291 (1960). There the Commission decided that it had jurisdiction over a delivery of gas by one interstate pipeline company to another interstate pipeline company pursuant to an exchange agreement under which each would receive gas from the other at points within the State of Oklahoma and an equivalent amount of the gas exchanged would be consumed within the state. The Commission, in that case, found that the gas sold actually would be transported outside Oklahoma for resale. Accordingly, in the instant case, the Commission held "that a sale of gas in interstate commerce for resale cannot be transmuted into something else by contractual provisions." (R. 272).

The Commission's Opinion also reviewed numerous court decisions concerned with the issue of what sales are sales for resale in interstate commerce and subject to regulation. (R. 264-71). The Commission refused to be governed by *City of Hastings v. Fed-*

eral Power Commission, 221 F.2d 31 (D.C. Cir. 1954), cert. denied 348 U.S. 820 (1955), and *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), because such cases involved direct sales of gas or electric energy for ultimate consumption in the state of sale for local purposes. The instant case, by contrast, involves sales to a pipeline system to enable the pipeline company to carry on its interstate business. (R. 271). The Commission also found that *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957), where the commingled interstate stream contained only the gas of a single seller, was distinguishable from the instant case where the interstate pipeline is to be filled with gas from sources other than Lo-Vaca and Houston.

The Commission further found that regulatory considerations demanded the exercise of its jurisdiction:

> "It would be possible for a pipeline to discriminate among producers by giving certain ones the privilege of selling to it the gas which by agreement would be deemed to be segregated from the interstate stream and to be resold and consumed in the state of production or used in compressor stations. This may increase the cost to interstate customers and at the same time put them at a competitive disadvantage in obtaining additional supplies of gas." (R. 269).

One Commissioner dissented in part from the decision of the majority. (R. 274-77).

Applications for rehearing were filed by Lo-Vaca (R. 317-31), Houston (R. 277-88) and El Paso (R. 289-316). Said applications were denied by the Commission by order of December 12, 1961. (R. 332-34).

D. Proceeding in the Court of Appeals.

On February 6, 1962, Lo-Vaca, Houston and El Paso filed in the United States Court of Appeals for the Fifth Circuit a joint petition to review the Commission's decision. (R. 1-18). California and Southern California Gas Company and Southern

Counties Gas Company of California (Southern Companies) were granted leave to intervene in support of the Commission in the court proceeding. Oral argument was heard by the court on January 7, 1963.

1. The Majority Opinion.

On September 24, 1963 the court issued its decision which vacated the order of the Commission under review. (App. A, pp. 1-15, 323 F.2d 190). The Court relied upon *United States v. Public Utilities Commission*, 345 U.S. 295, 318 (1953), wherein this Court, in considering whether a distinction for jurisdictional purposes could be made between electric energy sold in interstate commerce to the United States Navy for its own use and electricity sold to the Navy for resale, stated that such separability would turn on whether "an essentially separate transaction covering the power directly consumed by the purchaser is identifiable". The Fifth Circuit found that Lo-Vaca, Houston and El Paso "carefully tailored their transactions to fit the above *caveat*". (App. A, p. 5, 323 F.2d at 192).

The majority of the court, in vacating the Commission's decision, relied also on *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954), cert. denied 349 U.S. 420 (1955), and *North Dakota v. Federal Power Commission*, 247 F.2d 178 (8th Cir. 1957). The *City of Hastings* case, the court held, stands for the proposition that a direct sale of natural gas to a city for plant fuel, even if commingled with gas also sold to the city for resale, is nonjurisdictional if the sale was covered by separate rate and contract. (App. A, pp. 5-6, 323 F.2d at 192-193). The *North Dakota* case, the court stated, affirmed a finding of nonjurisdiction over gas produced and consumed in the State of North Dakota but commingled for transmission purposes with gas moving in interstate commerce. (App. A, pp. 6-8, 323 F.2d at 193).

The Commission's decision, the court continued, "ignores the nature of natural gas." (App. A., p. 8, 323 F.2d at 194). The court explained:

> "Must petitioners [La Vaca, Houston and El Paso] be driven to the unnecessary expense of constructing a parallel line to carry the 'non-jurisdictional' gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation." (App. A, p. 8, 323 F.2d at 194, fn 6).

In concluding, the court considered the argument advanced by the California intervenors that the Commission must have complete price jurisdiction over gas that inevitably is sold for resale in interstate commerce. The Court said that such a plea must be made to Congress and not to the judiciary. (App. A, p. 9, 323 F.2d at 194).

2. The Dissenting Opinion.

In the dissenting opinion Circuit Judge Rives urged that jurisdiction should not turn on contract clauses "that do not correspond and are not intended to correspond to reality." (App. A, p. 14, 323 F.2d at 197). Whether gas is transported in interstate commerce or sold in interstate commerce for resale depends, according to the dissenting opinion, "not on what the parties say about the transaction but on what is done with the gas." (App. A., p. 14, 323 F.2d at 197).

In Judge Rives' view, the three cases relied on by the majority[6] do not permit a finding of nonjurisdiction solely on the basis of contractual language. Relying instead on this Court's opinion

6 See pages 9-10, *supra*

in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515, 529 (1945), the dissenting opinion stated: " 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.' " (App. A, p. 14, 323 F.2d at 197). Likewise, federal jurisdiction follows the flow of natural gas.

3. Petitions for Rehearing

Petitions for rehearing of the court's decision were filed by California, the Commission and the Southern Companies. The petitions were denied by order of the court, without opinion, dated December 17, 1963 (App. C., p. 18, *infra*).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is that the Commission overstepped its jurisdictional boundaries and extended its regulatory powers into an area the Congress placed "off limits" to the agency. Contrary to such decision, the jurisdiction of the Commission, under the undisputed facts of this case, is supported by the Natural Gas Act and the decisions construing that Act, and by the precedents of the Commission.

A. The National Importance of This Case.

The interest of California in this proceeding stems from the fact that at least some part of the gas involved in this proceeding actually will flow to household and industrial consumers within the state. (R. 57, 65-66). Moreover, California, as the largest natural gas consuming state in the nation,[7] asserts its interest as a local regulator of natural gas and as a party to proceedings affecting the state before the Federal Power Commission. Yet the question presented by this case is not peculiar to California's interest. The question affects every natural gas consuming state in the nation.

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[7] In 1962 California purchased over 715,000,000,000 cu. ft. of gas from El Paso at a cost of $258,000,000

The decision of the Court of Appeals is in conflict with the intent of Congress, in enacting the Natural Gas Act, to provide a comprehensive scheme of natural gas regulation. As shall be shown, the decision creates an attractive gap in such scheme and permits the subversion of Commission jurisdiction by private bargain. The decision of the court below clashes with this Court's decision in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961), which urged a broad interpretation of the Natural Gas Act to assure accomplishment of the congressional program.

The gas involved in this proceeding will be produced in the Gulf Coast area of the State of Texas, and will be sold under contracts at initial prices ranging between 19.5 and 22 cents per Mcf. These prices exceed the Commission's Statement of General Policy No. 61-1 price of 16 cents per Mcf[8], and will exceed any price El Paso currently is paying for natural gas for interstate transportation. Since the costs incurred through the Lo-Vaca and Houston purchases will increase El Paso's cost of service, the inability of the Commission to regulate the sales at the outset can materially injure California gas consumers. Moreover, the efforts of the Commission to stabilize gas prices through the Policy Statement will suffer a serious setback.

This case involves a huge volume of gas. Lo-Vaca will sell 50,000 Mcf per day; Houston will sell an average of 70,000 Mcf per day. If these sales go unregulated, at excessive rates, comprehensive regulation for consumer protection will be more illusory than real.

The problem created by the opinion of the majority of the court below is of considerable magnitude. By refusing to recognize one aspect of Commission authority, the ability of the Com-

8. Statement of General Policy No. 61-1, 18 C.F.R. Sec. 2.56, as amended October 25, 1960, December 20, 1960, April 15, 1961, December 30, 1961, September 7, 1962, March 27, 1963, November 27, 1963, and December 9, 1963.

mission to achieve any type of effective regulation is impeded. A decision, therefore, in this matter by this Court is needed.

B. An "Attractive Gap" Is Created.

This Court has consistently held that the purpose of the Natural Gas Act "is to create a comprehensive and effective regulatory scheme * * * to protect consumer interests against exploitation at the hands of natural gas companies." *Panhandle Eastern Pipe-line Co. v. Public Service Commission*, 332 U.S. 507, 520 (1947). Such comprehensive regulation does not envision "gaps" where neither the federal agency nor any state can be expected to exercise authority in the interest of consumer protection. In *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961), this Court stated:

> "Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource."

This case is an "attractive gap" case. Unlike *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957), principally relied upon by the court below, the result in this case is nonregulation. In *North Dakota* a finding of no federal jurisdiction resulted in state regulation of the sale. In that case, where the State of North Dakota was demanding the exercise of federal jurisdiction, the court stated: "While the court recognizes the petitioners' [the State and the Public Service Commission of North Dakota] proper concern for the interests of North Dakota natural gas consumers in the newly developing market area, the conclusion is inescapable that the jurisdiction rests not with the FPC but with petitioners themselves." 247 F.2d at 178. In the instant case, by contrast, if federal jurisdiction is denied recognition, regulation to protect natural gas consumers in California is forever foreclosed. California cannot influence what transpires

in Texas, Arizona and New Mexico. The State of Texas—where the gas involved herein is produced—has no conceivable or asserted interest in the price regulation, for the benefit of California consumers, of Lo-Vaca's gas or Houston's gas.

Without federal regulation and without state regulation, the gap in the congressional scheme of regulation is indeed an attractive one. Invariably, interstate pipeline companies, like El Paso, utilize some parts of the interstate streams of gas they transport as fuel for compression units and other facilities along the pipeline. Now, as the result of the decision of the court below, gas so consumed can be contractually labeled "nonjurisdictional" and an unregulated price can be set therefor. The stream of gas which will contain the Lo-Vaca and Houston gas is an accumulation of gas from many sources. Now, by the magic of words lodged in a contract, Lo-Vaca and Houston will get a higher, unregulated price for their gas even though the gas is admittedly lost in the stream.

This is not a case where federal and state authorities have clashed for jurisdiction over a sale—and one authority has prevailed over the other. Such cases are consistent with a comprehensive scheme of regulation which calls for federal jurisdiction over matters of national concern and state jurisdiction over matters of local concern. What is abhorrent in this case is the creation of a "no man's land". And such is the effect of the Court of Appeals' decision.

In *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961), this Court laid down a "broader principle" to be utilized in interpreting the Natural Gas Act:

> "[I]n a borderline case where congressional authority is not explicit we must ask whether state authority can practically regulate a given area and, if we find it cannot, then we are impelled to decide that federal authority governs."

In contrast to such "broader principle", the court below narrowly construed the Act. The court said:

> "It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing, or redrawing it." (App. A., p. 9, 323 F.2d at 194).

This case presents no necessity for a revision of the Act by Congress. That Congress intended comprehensive regulation has long been clear. The question for this Court to consider is whether an "attractive gap", such as has been described, is to be tolerated. Such attractive gaps leave the citizens of the state where the gas is consumed unprotected and without a remedy. Certainly, this was not the intention of Congress.

C. Commission Jurisdiction Cannot Be Subverted by Private Contract Alone.

Parties to natural gas contracts have been given, through the decision of the court below, the unique privilege of deciding for themselves whether their gas is to be jurisdictional, if such, is desirable, or nonjurisdictional, if that is the better alternative. The actual flow of their gas in interstate commerce for resale is apparently irrelevant.

California maintains that the language in the Lo Vaca and Houston contracts cannot control or change the actual facts. According to the undisputed facts involved herein, there is no molecular segregation of the Lo-Vaca and Houston gas from the gas admittedly resold in interstate commerce. (R. 262-63). The gas is segregated only in the sense that the parties say it is segregated.

In electric energy cases this Court has stated that "federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental

test." *Connecticut Light and Power Co. v. Federal Power Commission*, 324 U.S. 515, 529 (1945). There is no apparent reason for distinguishing electric energy from natural gas energy under the above rule. Yet, the court below applied a legal test of "fungibility". (App. A., p. 8, 323 F.2d at 194).

Fungibility is not an essential fact by itself. California produced gas commingled with interstate gas within California for consumption in California, and nowhere else, does not give rise to federal regulation of the California gas. As a *physical* fact such gas never is transported in interstate commerce. On the other hand, the commingling of the Lo-Vaca and Houston gas with interstate gas means that at least some of the Lo-Vaca and Houston gas will *physically* enter interstate commerce for resale. The mixing of gases is not the important element here, but the actual flow is critical.

El Paso bleeds off quantities of gas from its interstate line and conveniently labels them "Houston Gas" or "Lo-Vaca Gas." This is a fiction. It ignores the facts that the gas of other suppliers besides Lo-Vaca and Houston are in the line (R. 60), that the amount tapped from the line is actually the fuel requirement of the facility served and need only be equal, at least, to the amount purchased from Lo-Vaca or Houston. (R. 67-68).

California maintains that insofar as contracts are expressions of agreement, such agreements cannot override the physical facts of interstate transportation and sale for resale.

California asks that this Court consider whether parties can, by mere contractual words, control an unidentifiable portion of gas in an interstate stream otherwise subject to federal regulation. This is a significant question. For this case involves no change in basic operations by El Paso—only an additional supply of gas which by a fiction will replace gas presently consumed in facilities in Arizona, New Mexico and Texas. The choice here is between fantasy and reality.

CONCLUSION

In view of the Court's consistently broad interpretation of the Natural Gas Act based upon the intent of Congress to provide a comprehensive regulatory scheme, and the narrow interpretation made by the court below, California respectfully requests the opportunity to present this question of the Federal Power Commission's jurisdiction to the Court more fully. This is an important question of public law. Its resolution will have far-reaching effect.

California respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Dated: March 12, 1964.

RICHARD E. TUTTLE
Chief Counsel

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Attorneys for the People of the State of California and the Public Utilities Commission of the State of California

(Appendices Follow)

Appendix A

In the United States Court of Appeals for the Fifth Circuit

No. 19478

Lo-Vaca Gathering Company, Houston Pipe Line Company
and
El Paso Natural Gas Company,

Petitioners,

versus

Federal Power Commission,

Respondent.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

(September 24, 1963.)

Before Rives and Cameron, Circuit Judges,
and Bootle, District Judge.

Cameron, Circuit Judge: The question here involves solely the extent of the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act.[1] The facts underlying the

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1. The section outlining jurisdiction is 15 U.S.C.A. § 717 (b):
"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, *to the sale in interstate commerce of natural gas for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [Emphasis added]

controversy presented by this petition for review of an order of the Federal Power Commission are not in dispute and are, briefly, as follows:

Lo-Vaca Gathering Company (Lo-Vaca) requested certificate authority with respect to two contracts involving the delivery of natural gas to El Paso Natural Gas Company (El Paso). The first request involved the "gathering and delivery" to El Paso of 50,000 Mcf (meaning, thousand cubic feet) of natural gas per day, and the second involved the "gathering and sale" of 70,000 Mcf per day. Authority requested under the first contract is thus limited to the "gathering and delivery" rather than the sale of the gas. Petitioners contend that regulation of the *sale* is not within the Commission's jurisdiction under the Act because that volume of gas is not to be resold. The contract provides:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

Jurisdiction is not disputed as to the second Lo-Vaca contract.

Houston Pipe Line Company (Houston) proposes to sell to El Paso 70,000 Mcf of natural gas per day to be consumed wholly within the State of Texas. The contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas."

It is not necessary here to outline the complicated routing of the gas through El Paso's multiplex lines. It is enough to say that, in each instance, petitioners propose to meter into the system,

in Texas, the specified volumes of gas; that this gas will be commingled with gas already in the lines (which gas is admittedly "jurisdictional"); that other gas will later be put into the lines; and that, at the points described in the quoted clauses of the contract, an equal volume of gas will be withdrawn for "non jurisdictional" use. The Commission does not claim that the physical in metering—out-metering will not be faithfully consumated just as the contracts provide; rather, it argues that as a matter of physical reality the gas withdrawn will not be "non jurisdictional" gas because it will not be the *identical* gas metered into the lines under the contracts.

More quickly to delineate the issue drawn here, it should be noted that the Commission admits, as it must, that if the volumes under consideration were in some manner physically segregated it would not and could not claim jurisdiction over the sales. The Houston sale would not be subject to the Commission's jurisdiction because it would not be a "sale in interstate commerce;" and the Lo-Vaca sale, though in interstate commerce, would not be "for resale." 15 U.S.C.A. § 717 (b). See, *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 1947, 332 U.S. 507. The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is, but the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its "non jurisdictional" status.

We hold that it does not. Gas is gas, and borrowing the words of Judge Brown, in connection with a different petroleum problem, ". . . the principles of constitutional law and statutory construction are not equated with laws of physics, so that the

inquiry is something more than the schoolboy's quest for molecular identification." *Deep South Oil Co. of Texas v. Federal Power Commission*, 1957, 5 Cir., 247 F.2d 882, 891 (dissenting opinion).

First, we may discuss what is *not* involved. No question of constitutional limitations under the Commerce Clause need be considered. The Commission's jurisdiction under § 717(b) is not so broad as the scope of the federal power under Art. 1, Sec. 3, Cl. 3 of the Constitution. Its jurisdiction over the sale of natural gas is limited:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. . . .
>
> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra* at 516, 517.

And, as we have said, the sales would admittedly be "non jurisdictional" if the gas so sold were not mixed and commingled with other gas which was to be resold in interstate commerce. So the question is more finely drawn: if the gas metered out for "non jurisdictional" use will not be made up of the identical molecules as the gas so metered in, does the Commission thereby gain jurisdiction of the sale? Petitioners rely principally on two

cases from the courts of appeal[2] to support their theory of "fungibility" or "separation by contract." These cases, in turn, rely on the language of *United States v. Public Utilities of California*, 1953, 345 U. S. 295. The *Public Utilities of California* case is the starting point.

The Navy contracted with California Electric Power Company to purchase electrical energy in California for the Navy's use[3] in Nevada. Delivery of the power was made at a sub-station about twenty-five miles from the Nevada line. The Power Company argued that jurisdiction of the Commission attached only to that portion of the energy resold by the Navy. Assuming *arguendo* that the energy could be so divided for jurisdictional purposes, the Court said that such separability "would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable . . . But there is no record evidence of separate rates, separate contracts or separate rate regulation by official bodies; in short, that the 'sales' themselves were separate . . .", pp. 317-318. The petitioners here have carefully tailored their transactions to fit the above *caveat*.[4]

City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420 (1955) involved a situation strikingly similar to the Lo-Vaca proposal. The City entered into two contracts with a supplier for the purchase of gas. One contract involved gas to be resold by the City and the other involved gas to be used by the City in its power plant. The gas came from out-of-state sources and was thus a "sale in interstate

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2. North Dakota v. Federal Power Commission, 1957, 8 Cir., 247 F.2d 173; City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F.2d 31, certiorari denied, 349 U.S. 420.

3. The Navy consumed some of the power and resold another portion.

4. Pennsylvania Water and Power Co. v. Federal Power Commission, 1952, 343 U.S. 414 is inapplicable. That case did not involve separate transactions, etc.

commerce." The gas sold under both contracts was delivered to the City in a commingled stream and, in holding the not-for-resale sale "non jurisdictional", that court said:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocations of gas and effective separate measurement facilities." [P. 36]

The situation in *North Dakota v. Federal Power Commission*, 8 Cir., 1957, 247 F. 2d 173, was very much like that involved here under the Houston contract. There, Montana-Dakota Utilities Company entered into two contracts for the purchase of gas for sale in intrastate market and two contracts for the purchase of gas for the interstate market. Gas under all four contracts was delivered to Montana-Dakota in a commingled stream at one delivery point in North Dakota. Some of the gas was then resold in North Dakota and attributed to the intrastate purchase contracts. The question phrased by the court was: ". . . does natural gas produced, wholesaled, transported, and sold for immediate consumption solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce . . .?" [P. 176] The court concluded:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' [intrastate sales] contracts are easily identifiable and determinable."

We think the rationale and holdings of these cases are controlling here.[5]

The Commission here seeks to distinguish *Hastings* and *North Dakota* by the fact that, in those cases, all the gas sold was supplied by the same seller, whereas here El Paso is supplied by many sellers other than Lo-Vaca and Houston. It argues that to allow El Paso to "pick and choose" the suppliers of the "non-jurisdictional" quantities needed would be to allow the purchasing pipeline to discriminate between its various suppliers. The question, however, is whether the gas is effectively segregated by the device of a contract, rather than some physical barrier; and, therefore, the question of discrimination is irrelevant, insofar as the initial sales jurisdiction is concerned, if regulation of the sales is not within the jurisdiction of the Commission. If the gas could, in some manner, be transported in a physically segregated manner, jurisdiction would not attach; under the rationale of *Hastings* and *North Dakota*, and the language of *United States v. Public Utilities*, contractually-segregated gas is not jurisdictional; it must follow that discrimination *vel non* is not a proper area of inquiry. We can see no difference in the controlling legal principles here,

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5. In both North Dakota and Hastings, the Commissioner disavowed jurisdiction, taking a position directly contrary to that taken here. E.g., a passage from the Commission's brief in North Dakota (before this court by agreement):

"For those decisions make it plain that the indistinguishable commingling of jurisdictional and non jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale, with other gas (or electricity) not delivered in interstate commerce or not for resale, it is necessary for the Commission to determine whether (or not) an essentially separate transaction (for the non-jurisdictional delivery) . . . is 'identifiable'. United States v. P.U.C. of California, 345 U.S. 295, 318. The decisions spell out the principles upon which the Commission here rightly concluded that transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate."

even though the facts are somewhat different, as they are in almost all cases.

Neither is the question whether the expenditures are reasonable and prudent, and thus includable in the pipeline's cost of service for rate computation purposes, before us here. Nor is there before us any question as to *transportation*, rather than *sale*, certificate authority.

The Commission's position ignores the nature of natural gas. Gas in a pipeline can be separated only "on paper" or conceptually, or, at least, this is the cheapest and most practical way to do it.[6] Gas lines *transport* gas for others, and we doubt that the owners are ever delivered the identical molecules turned over to the carrier. As we have said, gas is gas. The concept of separate identity, by volume, is not new. This Court, in a "hot oil" case, recognized that contraband oil commingled with lawfully produced oil could not be separated, as a physical fact. We concluded that both "justice and practical convenience would be served by allowing a separation as is proposed [proportional separation] . . . Commingling and proportional separation is daily practiced in the business of grain elevators, pipe lines, and the like. We see no reason why the practice is not proper here." *Federal Tender Board No. 1 v. Haynes Oil Co.*, 1935, 80 F.2d 468, 469.[7]

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6. Must petitioners be driven to the unnecessary expense of constructing a parallel line to carry the "non-jurisdictional" gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation.

7. *See also, Humble Oil and Refining Company v. Texas and Pacific Ry. Company*, 1955, Sup. Ct. Tex., 289 S.W. 2d 547, 552: "The fact that Humble was also shipping from New Mexico should not change the character of its shipments originating in Texas. Accordingly, we hold that the oil produced in and shipped from New Mexico to East Texas takes an interstate rate and the oil produced in West Texas and shipped to East Texas takes an intrastate rate, and this irrespective of its being commingled with other oil enroute."

We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional gas. Their plea should be made, however, to Congress and not us. The courts are not competent to make legislative decisions as to whether jurisdiction *should* be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them.

In closing, we must comment on the Commission's assertion that petitioners "beg the question" by stating that the sales are not "jurisdictional" because, as a matter of fact, most of the gas molecules put into the lines are sold in interstate commerce and will be resold. As we see it, this is not begging the question but is merely stating it. We hold that such gas is not "resold" in interstate commerce, because it is contractually segregated and is either consumed by the pipeline itself, or resold in Texas.

It is clear, moreover, that all of the gas is *not* sold for resale in interstate commerce. It must follow that, if those volumes of gas can be segregated, the Commission has no legitimate interest in the sale of that amount of gas. The method of segregation used here seems to be the most practical one. No one has suggested to us any reason why the mixing or commingling of this gas with other gas hampers the regulation of sale of the "jurisdictional" gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consummation of these plans. The substance of the proposals is that "non jurisdictional" gas will honestly be used for "non jurisdic-

tional" purposes. Congress' refusal to give jurisdiction over such sales, assuming it has the constitutional power to do so, should not be thwarted because of the physical nature of natural gas.

The petition for review is granted; the petitioners' request that the Commission's order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption, be set aside is granted and the case is remanded for disposition not inconsistent with this opinion.

ORDER VACATED.

Rives, Circuit Judge, Dissenting:

As shown in 15 U.S.C.A. § 717(b), quoted in footnote 1 to the majority opinion, the Commission has jurisdiction of (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural gas companies engaged in such transportation or sale." The questions for decision are whether the Commission has jurisdiction over proposed sales of natural gas by Lo-Vaca and by Houston to El Paso.

The controlling facts as found in the opinion of the Commission are as follows:

> "Lo-Vaca . . . at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf. There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract,

but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

> "'All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.'

Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

". . . . Since 1925, it [Houston] has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢ plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled

with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, 'El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas.' El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

"The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

"El Paso proposed . . . to supply its mainline compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

"Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6.091 M²cf per day and on a maximum day would exceed the supply by 31.879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

"The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21.373 M²cf per day on an average day and by 36.549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part

be carried on to El Paso's customers in New Mexico, Arizona and California."

Thus Houston's and Lo-Vaca's respective contracts with El Paso attempt to restrict the use of the gas to nonjurisdictional purposes, and provide, on the principle of "fungibility," that if their gas is not in fact used for the contractually stated nonjurisdictional purpose, an equal volume of gas supplied by some other supplier will be so used. The Commission refused to let its jurisdiction turn upon the provisions of contracts that do not correspond and are not intended to correspond to reality. I agree with the Commission.

Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas. This Court so held in *Deep South Oil Co. v. F.P.C.*, 5 Cir. 1957, 247 F.2d 882, and its companion case, *Shell Oil Co. v. F.P.C.*, 5 Cir. 1957, 247 F.2d 900. In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g.*, *Sprout v. South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR v. Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co. v. Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co. v. Power Comm'n*, 1945, 324 U.S. 515, 529: "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."

A detailed discussion of the facts of the cases relied on by the majority would unduly prolong this opinion. Carefully considered, I submit that none of those cases permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional

seller into the particular "restricted" use. In no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality.

The Commission's jurisdiction over the proposed sales of natural gas by Lo-Vaca and by Houston to El Paso is much more clear than its jurisdiction sustained in *United Gas Pipe Line Company*. Opinion No. 401 of the Commission issued August 26, 1963.

I respectfully dissent.

Appendix B

United States Court of Appeals for the Fifth Circuit

October Term, 1962

No. 19478

Lo-Vaca Gathering Company, Houston Pipe Line Company
and
El Paso Natural Gas Company,
Petitioners,

versus

Federal Power Commission,
Respondent.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

Before Rives and Cameron, Circuit Judges,
and Bootle, District Judge.

JUDGMENT

This cause came on to be heard on the Petition of Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, for review of an order of the Federal Power Commission issued on October 23, 1961 in Docket Nos. CI60-693, Et Al., and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted; the petitioners' request

that the Commission's Order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption be set aside is granted; and that this cause be, and it is hereby, remanded to the Commission for disposition not inconsistent with the opinion of this Court.

Rives, Circuit Judge, dissents

September 24, 1963

Issued as Mandate:

Appendix C

In the United States Court of Appeals for the Fifth Circuit

No. 19478

Lo-Vaca Gathering Company, Houston Pipe Line Company
and
El Paso Natural Gas Company,
Petitioners,
versus
Federal Power Commission,
Respondent,
Southern California Gas Company, et al.,
Intervenor-Respondents.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

(December 17, 1963)

ON PETITON FOR REHEARING

Before Rives and Cameron, Circuit Judges, and Bootle, District Judge.

PER CURIAM

This cause coming on for hearing upon the petition for rehearing filed on behalf of the Respondent Federal Power Commission, together with motion for rehearing by the Court en banc, joined in by Southern California Gas Company et al as Intervenor-Respondents, and the Court having considered the same and the briefs filed in support and in opposition thereto, it is ordered and decreed that the said petitions for rehearing and also the motion for rehearing en banc be, and they hereby are, DENIED.

Judge Rives: Dissent

Judge Bootle: Concur

Appendix D

RELEVANT PARTS OF STATUTES INVOLVED

The relevant parts of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821-833 (1938), 15 U.S.C. §§ 717-717w (1958)) involved in this proceeding are as follows:

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities

be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

SEC. 2. When used in this act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively. [52 Stat. 821 (1938); 15 U. S. C. § 717a]

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f(a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake

the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U.S.C. § 717f (f)]

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already

being served by another natural-gas company. [56 Stat. 84 (1942); 15 U. S. C. § 717f (g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*. That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U. S. C. § 717f (h)]

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the

Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U. S. C. § 717o]

Office Supreme Court, U.S.
FILED
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[illegible] DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 19[illegible]

No. [illegible] 47

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, a corporation, and HOUSTON PIPE LINE COMPANY, a corporation, and EL PASO NATURAL GAS COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

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October Term, 1963
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SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, a corporation, and HOUSTON PIPE LINE COMPANY, a corporation, and EL PASO NATURAL GAS COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause September 24, 1963, and by which a divided Court reversed an Order of the Federal Power Commission.[1]

[1]Respondents below, in addition to the Petitioners herein, were the Federal Power Commission, People of the State of California, and the Public Utilities Commission of the State of California.

Citations to Opinions Below.

The Opinion of the Federal Power Commission is reported at 26 F.P.C. 606 and a copy is appended as Appendix A.

The Opinion of the Court of Appeals [R. 383] is reported at 323 F.2d 190 and a copy is appended as Appendix B.

The judgment of the Court of Appeals [R. 402] is appended as Appendix C.

Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was dated and entered September 24, 1963 [R. 402], a timely petition for rehearing was filed on October 15, 1963 [R. 437], and was denied on December 17, 1963 [R. 467], without opinion, Rives, Circuit Judge, dissenting. A copy of the Order denying rehearing is appended hereto as Appendix D.

The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254 (1).

Question Presented.

The basic issue to be determined is whether the jurisdiction of the Federal Power Commission follows the *actual flow* of a commingled supply of natural gas from Texas to California in interstate commerce for resale, or whether this jurisdiction may be avoided by a *contract provision* which, while recognizing the actual flow, provides that for *contractual purposes* this commingled supply of gas shall be used for nonjurisdictional purposes.

Stated in another fashion, the issue is as to whether the jurisdiction of the Federal Power Commission is

dependent upon fact rather than fiction, upon *actual flow* of gas in interstate commerce rather than upon *contractual flow.*

Statute Involved.

The statute involved is §717 of the Natural Gas Act. Section 717 is set forth in Appendix E *infra*, page 78.

Statement of the Case.

Petitioners herein were Intervenor-Respondents in the Court below and were also Intervenors before the Federal Power Commission in its Opinion No. 348 (26 F.P.C. 606)..

For the purposes of this Petition, we accept the facts as found by the Federal Power Commission and which are set forth in its Opinion No. 348 (Appendix A *infra*). El Paso Natural Gas Company (El Paso) is a natural gas pipeline company with an interstate pipeline system extending from its origin within the State of Texas to the State of California. El Paso proposes to increase its sources of supply, by obtaining gas from south Texas, through contracts which it has entered into with Houston Pipe Line Company (Houston) and Lo-Vaca Gathering Company (Lo-Vaca). In order to obtain the gas from these sources, it will be necessary to extend the El Paso interstate pipeline system from Sonora in west Texas to Three Rivers, Texas. It is proposed that El Paso Gas Supply Company, a subsidiary of El Paso, build the 227.6-mile 30" pipeline required for this purpose. Both Houston and Lo-Vaca would deliver their contracted supplies of gas to El Paso at Three Rivers. At this point the Houston and Lo-Vaca gas would enter the El Paso Natural Gas Company interstate pipeline system as extended.

The Federal Power Commission found that the gas to be provided by Houston and by Lo-Vaca, pursuant to the contracts which are the subject of this proceeding, would form part of a commingled stream of gas flowing from Texas through New Mexico and Arizona into California, and the commingled stream of gas would physically be used to supply El Paso's customers gas which would be in turn resold by them in interstate commerce. The contracts under which those gas supplies would be furnished provide in essence that the gas is to be used for nonjurisdictional purposes. Despite the contractual provisions, the gas would actually flow as heretofore described. None of the parties herein has at any time claimed that the gas supplied by Houston and Lo-Vaca would not physically flow in interstate commerce for resale. Respondents contend, however, that the contractual provisions for nonjurisdictional use of the gas prevail over the admitted flow of the gas in interstate commerce for resale. The majority opinion in the Court below conceded that this Houston Lo-Vaca gas would actually be resold in interstate commerce. The decision states at page 191 of 323 F. 2d:

> "The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted . . ."

Despite this, the majority opinion held that the contractual provisions prevailed.

Basis of Jurisdiction.

Federal jurisdiction in the Court of first instance was based upon the fact that the case comes properly within the provisions of the Natural Gas Act, 15 United States Code.

Reasons for Granting the Writ.

The proposed physical flow of Houston Lo-Vaca gas through the El Paso interstate pipeline system to California for resale would subject their respective sales of gas to El Paso to the jurisdiction of the Federal Power Commission. An effort is made to provide by contract what, in fact, cannot physically be accomplished, and by this subterfuge to seek to escape regulation. The author of Alice in Wonderland would indeed be impressed by the fantasy which has been sought to be created in this proceeding. Forty-five per cent of the El Paso jurisdictional sales are to the Southern California Gas Company and Southern Counties Gas Company of California at the California border, with an additional forty-five per cent being sold to Pacific Gas and Electric Company, a northern California utility, also at the California border. Accordingly, by far the major part of gas supplies purchased by El Paso are destined for resale in California and are delivered through El Paso's interstate pipeline system stretching from Texas to California. Upon receipt of the Houston Lo-Vaca gas, this gas will form part of that flow.

I.

The Flow of Gas in an Interstate Pipeline System as Part of a Commingled Supply of Gas Destined for Resale in Interstate Commerce Subjects Such Gas to the Jurisdiction of the Federal Power Commission.

The *fiction* of intrastate use must yield to the *fact* of interstate commerce.

Gas to be provided by Houston and by Lo-Vaca under and by virtue of their contracts here in question with El Paso,

> ". . . inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California, . . ." [R. 211].

The majority opinion concedes on page 191 of 323 F. 2d that:

> ". . . the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted . . ."

The jurisdiction of the Federal Power Commission applies to:

> ". . . the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . ." (15 U.S.C. §717(b)).

In the case of *F.P.C. v. Natural Gas Pipeline Company* (1942), 315 U.S. 575, 86 L. Ed. 1037, the U. S. Supreme Court stated at page 582:

> "The sale of gas originating in one state and its transportation and delivery to distributors in any other state constitutes interstate commerce, which is subject to regulation by Congress."

Accordingly, the basic facts are: Because gas to be sold under the contracts in question "inevitably would be physically transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California," it is the duty of the Federal Power Commission to carry out the purpose of the Natural Gas Act by exercising its jurisdiction over the sales for resale in interstate commerce involved in each of the contracts here in question.

Any lingering doubt which could have existed that this is so, has been completely dispelled by the decision reached by this very Court earlier this month in the case of *F.P.C. v. Southern California Edison Co., et al.*, ... U.S. ..... (Nos. 71 and 73, dated March 2, 1964). In that case, commonly referred to as the *Colton* case, this Court reversed the decision of the Court of Appeals for the Ninth Circuit, and thereby affirmed a finding and decision by the Federal Power Commission that because out-of-state energy from the Hoover Dam in Nevada was included in the energy delivered by Edison to its customer, the City of Colton, California, the Federal Power Commission had jurisdiction over the sale of electrical energy as a sale in interstate commerce. In reaching that conclusion this Court stated:

> "We have said of Part II of the Power Act that 'federal jurisdiction was to follow the flow of electric energy, *an engineering and scientific, rather than a legalistic or governmental, test.*' *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 529. (Italics supplied.) We have examined the proofs. They are in sharp conflict but we hold that the engineering and sci-

entific evidence received by the Commission on the subject from the Commission's own experts afforded substantial evidence upon which to rest the findings which trace out-of-state energy to the City of Colton." (Footnote 5, page 4, Slip Opinion, *FPC v. So.Cal.Edison Co., supra.*)

Moreover, any possible contention that the flow of electric energy under the Federal Power Act might be different than the flow of gas energy under the Natural Gas Act has been dispelled by this Court's statement at page 6 of its opinion:

"In reviewing the court's ruling on this question we do not write on a clean slate. In decisions over the past quarter century we have held that Congress, in enacting the Federal Power Act and the Natural Gas Act, apportioned regulatory power between state and federal governments according to a test which this Court had developed in a series of cases under the Commerce Clause. *The Natural Gas Act grew out of the same judicial history as did the part of the Federal Power Act with which we are here concerned; and §201 (b) of the Power Act has its counterpart in §1(b) of the Gas Act, 15 U.S.C. §717(b), which became law three years later in 1938.*" (Emphasis supplied.) (Slip Opinion, *FPC v. So. Cal. Edison Co., supra.*)

This, of course, because of the provisions of Section 1(b) of the Natural Gas Act, is why the Federal Power Commission assumed jurisdiction over the instant sales involved in the present proceeding before this Court.

With the infinite capacity of the human mind to obfuscate simple, clear, basic issues, there have been efforts—as in this proceeding—to endeavor to circumvent these simple truths of the flow of this gas in interstate commerce for resale. Such endeavors are, of course, not new to the history of mankind, and history is largely composed of a record of the struggle between simple basic truths, and the effort to circumvent them.

It is clear, as reflected in the decisions of the courts of the United States, that the scales of justice are increasingly tipped in favor of reality, and that those selecting fantasy and imagery as their weapons, are increasingly doomed to defeat. It is true that our legal history does not reflect a uniform line of victories in the battle of substance versus form. In fact, the art of advocacy historically has involved an effort to avoid or circumvent matters of *substance* by the exercise of ingenuity in devising appropriate matters of *form*.

No longer can it be said, however, that when a matter of substance under the law clearly requires one result, the merits of the matter may be avoided through the astuteness of the artisan attorney in placing a different wrapping upon the very same package.

In the few situations where this has not been the result, upon the matter coming to light, upon being reexamined, the vestigial remains of another era are being appropriately disposed of. The realm of the law today is *reality*, and not *fantasy*.

The contentions advanced by the Respondents actually amount to no more than urging that the Courts ignore the *reality* that interstate commerce will in fact

occur, in favor of *fantasy*. A fantasy is urged that because the contracts in their language provide interstate commerce shall not occur, the Court should blind itself to and ignore the concededly true facts that Houston and Lo-Vaca gas will flow in interstate commerce for resale.

Mere words, which change nothing and affect nothing, are not a proper foundation for a judgment by this Court, ignoring what are conceded to be the true facts that the gas flows in interstate commerce.

Words that change and control the course of events may, upon appropriate occasion, form the basis not only for judgments by courts but by other bodies and persons. Words that move a people to their destiny—the words of a Winston Churchill forming a protective shield between the German legions at the shores of the English Channel, and the inspired people of the British Isles—are such words that change, fix, and control the course of human events.

The words upon which Respondents rely do not even affect the movement of gas to which they purport to apply. They control nothing; they change nothing; they fix nothing; they are nothing. They are words lost in the flow of Houston and Lo-Vaca gas westward through El Paso's interstate pipeline system for resale in the states of New Mexico, Arizona and California.

The flow of Houston and Lo-Vaca gas in interstate commerce is in no manner whatsoever affected by the contractual provisions. The flow of Houston and Lo-Vaca gas will remain precisely the same regardless of whether the contractual provisions referred to are in the contract or not. Not one more molecule of gas will

be used at El Paso's plant in Texas, or New Mexico, or Arizona because of the contracts in question herein, as the historical pattern of use at such plants will be continued.

From the moment of its entry into the El Paso interstate pipeline system near Three Rivers, Texas, this Houston gas will be commingled with and form part of, a commingled supply of Lo-Vaca and other gas destined for interstate commerce for resale.

The majority opinion's misconception of the issue before the lower court is demonstrated by its statement of the issue as,

> ". . . . the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its 'non jurisdictional' status." (Majority Opinion, page 191 of 323 F.2d.)

It is not commingling in and of itself which determines whether interstate commerce exists. For instance, if gas were received in the State of Texas from New Mexico and commingled with this Houston gas and none of this commingled gas thereafter left the State of Texas, it would be folly to contend that this Houston gas, because of the commingling with New Mexico gas, is gas in interstate commerce and therefore subject to the jurisdiction of the Federal Power Commission. However, it is equal folly to state that gas, which in fact forms part of a commingled supply of gas and actually flows in interstate commerce as a part of that commingled gas into the State of New Mexico, back into Texas, and on west to California for ultimate consumption, does not flow in interstate commerce and is not subject to the jurisdiction of

the Federal Power Commission merely because some provision in a contract provides that the gas shall be transported solely within the State of Texas and consumed solely within the State of Texas.

This Court is not in a position to blind itself to the facts of life. We are not here dealing with some fanciful, remote connection with interstate commerce upon which to base the jurisdiction of the Federal Power Commission. When we are speaking of this new supply of south Texas gas, which is to be transported west to California, we are speaking of the epitome of what constitutes interstate commerce. This gas was not acquired in order to supply El Paso stations from Sonora to El Paso Station nor from Sonora to Dumas. This gas was acquired in order to satisfy the increasing demand for gas in the western portion of the United States and, more specifically, in the State of California.

The entire contractual provisions in the contracts in question pertaining to their so-called "restricted use" are nothing but the creation of a fiction.

To point up the scope of the fantasy sought to be created by the contracts, consider these particular facts. El Paso purchases approximately 2,500,000 Mcf of gas daily within the State of Texas. [R. 68]. The daily gas supply from Houston of 70,000 Mcf would therefore comprise only 2.8 per cent of the total Texas gas supply. Isn't it rather ridiculous to assume that Houston gas, comprising merely 2.8 per cent of the total Texas gas supply, which flows within the large El Paso pipelines forming a portion of its extended interstate pipeline system for hundreds of miles both within the State of Texas and elsewhere, is so identifiable, is so separate from other transactions in interstate

commerce, that it can be said that this gas is used to supply 100% of the fuel requirements of El Paso plants hundreds of miles apart within the State of Texas and is thereby displacing the gas presently being used for such purposes?

If this Court holds that the *fact* of interstate commerce must yield to the *fiction* of intrastate use as expressed in a contract, a modern Noah's Ark is instantaneously required to save the Commission from the deluge of a flood of applications based on *interstate sales through intrastate contracts.*

Under the Houston and Lo-Vaca purchases, 200 M²cfd will be added to the over-all El Paso Natural System supplies of gas to be transported westward toward California. There is no evidence in this proceeding that there will be any increase whatsoever in the consumption of gas within the State of Texas, nor even in Arizona and New Mexico, because of access to these new south Texas supplies.

The California market *is* the El Paso market—bearing in mind the volumes of gas purchased from El Paso for resale in California. Additional volumes of gas purchased by El Paso are for all system purposes, including the major function of supplying the California gas market. The contractual provisions of the Houston Lo-Vaca contracts in no manner affect those basic facts.

It is inevitable that gas flowing through an integrated interstate pipeline system will be devoted to total system use. In the case of El Paso, which devotes 80 per cent of the gas which it sells to its market in California, the inevitable consequence is that additional gas supplies obtained by it will in major portion be disposed

of by way of a sale for resale to the California market. Because the Federal Power Commission recognized these elementary facts of the operation of the natural gas business, and of El Paso Natural Gas Company as an integrated interstate pipeline company, the Commission held the instant sales subject to its jurisdiction as sales in interstate commerce for resale.

The thorough grasp by the Commission of the problem confronting it, and its realization of the flood of applications which would occur (similar to the present one) should it approve such a *sham* as permitting a contractual provision to prevail over the actual course of events, resulted in the well-stated decision in this proceeding.

The Houston and Lo-Vaca gas supplies will flow through El Paso's interstate pipeline system as part of a commingled supply of gas destined for resale in interstate commerce. The corresponding jurisdiction of the Federal Power Commission, must and does attach.

II.

The Decision Below Conflicts in Principle With a Prior Holding of This Same Circuit Court.

The Federal Power Commission must exercise jurisdiction over sales of gas which form part of a commingled supply of gas flowing in interstate commerce for resale.

The Court of Appeals for the Fifth Circuit in the case of *Deep South Oil Co. of Texas v. F.P.C.* (1957), 247 F. 2d 882, upheld the finding by the Federal Power Commission of its jurisdiction over certain interstate commerce sales of commingled gas supply. Deep South sold its gas to two interstate pipeline companies, with the

meters being located on the leases near the wellheads from which the gas was being produced in the State of Texas. This gas was later commingled with other Texas-produced gas, and a portion of the commingled supply was resold in interstate commerce. Deep South filed a petition for a declaratory order that its sales of Texas gas were not subject to regulation under the Natural Gas Act.[2] The proceeding was consolidated for hearing with proceedings on two similar petitions filed by Shell Oil and Humble Oil.[3]

As the Fifth Circuit recognized, when Congress passed the Natural Gas Act,

> ". . . . Congress was fully informed as to the need for such regulation and among other considerations it was cognizant of the fact that the prices at which local distributing companies can sell gas are in very large part determined by the prices they are required to pay for the same to interstate pipeline companies."[4]

The Fifth Circuit then pointed out at page 886 of 247 F.2d:

> "It was strongly urged to Congress that the public cannot be protected from exploitation in the prices charged for natural gas unless Government shall control not only the price charged by the companies which deliver the gas to the consumer, but also the prices of all companies which cooperate in bringing the gas from the wells in the state of production to the ultimate consumer in the state of distribution."

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[2]Similar to the proceeding brought herein by Houston.

[3]Similar to the consolidation of the Houston and La Vaca matters herein.

[4]*Deep South* opinion at page 886 (247 F.2d 882).

Accordingly, it held that the sales of the commingled supplies of gas were subject to the jurisdiction of the Federal Power Commission by virtue of the provisions of Section 1(b) governing sales for resale in interstate commerce.

Petitioners, Southern California Gas Company and Southern Counties Gas Company of California, are the local distributing companies in Southern California which receive interstate supplies of natural gas from El Paso—receiving in fact in excess of 45 per cent of El Paso's total jurisdictional sales. As recognized by the Congress as herein quoted from the *Deep South* opinion:

> ". . . the prices at which local distributing companies can sell gas are in very large part determined by the prices they are required to pay for the same to interstate pipeline companies."[5]

If, in fact, the Federal Power Commission does not have the jurisdiction to control the price of gas charged in the contracts between El Paso and the two suppliers, Houston and Lo-Vaca, then the purpose of the Congress concerning protection of the public "from exploitation in the prices charged for natural gas", as recognized by the Fifth Circuit in the *Deep South* opinion, will have been successfully obviated by the relatively simple device of placing words in a contract to the effect that the gas shall be used for a nonjurisdictional use, when in fact, concededly under the evidence in the record, there is no possible manner by which the actual use of the gas may be so restricted. Without Federal Power Commission jurisdiction there will be no control of the price charged by Houston and Lo-Vaca which

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[5]See Footnote 4 *supra*.

are prices of "companies which cooperate in bringing the gas from the wells in the state of production to the ultimate consumer in the state of distribution."

As the Fifth Circuit pointed out at page 887 of 247 F.2d:

> "In numerous decisions, the Supreme Court has recognized that the Act was primarily designed to protect consumer interests against exploitation at the hands of private natural gas companies, ..."

This purpose would be completely thwarted should Respondents herein succeed in avoiding control by the Federal Power Commission over the extremely high priced gas which they propose to sell pursuant to these contracts. This increased cost would, of course, be passed on to the purchasers of gas supplies from El Paso, and as pointed out in the Federal Power Commission's Opinion and Order:

> "The greater part of its gas supplies is sold to its California customers at the border of that state." [R. 256.]

As was pointed out by the Federal Power Commission in its holding that it had jurisdiction of the sales at issue in this proceeding:

> "If we reached a conclusion different from that above, our regulation of gas rates would be handicapped. It would be possible, as in this case, for a pipeline to offer to purchase gas at a higher price than we would otherwise allow in the area upon the assertion that it would use this gas in its compressors or would deliver it to its intrastate customers even though the gas would actually be received into its general system transportation facilities and used for every system purpose." [R. 269.]

The majority opinion herein by the Fifth Circuit is obviously contrary to the principle established by that Court in its *Deep South* opinion. In the instant decision the majority opinion relies for support upon the *dissent* in the *Deep South* case, while Justice Rives in his dissent in this proceeding in the Fifth Circuit quite correctly points out that in the *Deep South* case and its companion case of *Shell Oil Co. v. F.P.C.* (5 Cir. 1957), 247 F. 2d 900, the Fifth Circuit had held that:

> "Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas."

This is, of course, eminently correct. Justice Holmes stated in the case of *Eureka Pipe Line Co. v. Hallanan* (1921), 257 U.S. 265, that:

> "As has been repeated many times, interstate commerce is a practical conception . . ." (p. 272).

In applying this practical conception, Justice Holmes stated for the Court that:

> "A case would not be withdrawn from the jurisdiction of this court in error by a declaration that a statute was addressed only to intrastate commerce if it was applied wholesale to freight passing across the continent." (p. 271).

Justice Rives in his dissent in this proceeding before the Fifth Circuit pointed out at page 197 of 323 F. 2d:

> "In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g., Sprout v. South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR v. Settle*, 1922,

260 U.S. 166, 170; *Eureka Pipe Line Co. v. Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co. v. Power Comm'n*, 1945, 324 U.S. 515, 529: 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.'"

It is, of course, the *Connecticut* case relied upon by Justice Rives which this Court has reaffirmed in the *Colton* case in reaching its conclusion that Federal Power Commission jurisdiction follows the physical flow of energy in interstate commerce.

III.

The Decision Below Will Have an Adverse Effect on the Administration of a Federal Statute Intended to Protect the Consumer.

This Court in the case of *Phillips Petroleum Co. v. Wisconsin* (1954), 347 U.S. 672, 98 L.Ed. 1035, stated:

> "'Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. *Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act.*'" (Emphasis added.)

If as stated, "Protection of consumers against exploitation at the hands of natural-gas companies was

the primary aim of the Natural Gas Act", it would ill serve that purpose for this Court to hold that, contrary to the fact of flow of gas in interstate commerce, parties may by the mere employment of selected language in a contract—by the exercise of sheer imagination—and without affecting in any manner whatsoever the actual interstate flow of gas, completely abrogate or subvert the intent of Congress to protect "consumers against exploitation".

In the noted *Phillips* decision the United States Supreme Court held that the Federal Power Commission must, regardless of its reluctance to do so, regulate sales of gas by producers in the field when such sales of gas are destined for resale in interstate commerce. The sales of gas of Houston and Lo-Vaca in this proceeding are sales of gas which will actually flow in interstate commerce for resale, and accordingly the Federal Power Commission must and has assumed jurisdiction thereof by its decision in this proceeding.

The Respondents herein, in their Brief filed with the Fifth Circuit, quite candidly stated at page 27:

> "From the facts of record, . . . it is obvious that Houston and Lo-Vaca carefully tailored their restricted-use contracts with El Paso to be exempt from Commission jurisdiction."

There is not even a pretense that there is any valid business purpose to these contractual provisions, other than the effort to avoid the jurisdiction of this Commission. The contract with Houston, which provides that the gas shall be used only for intrastate purposes, obviously has no business purpose except to attempt to comply with the provisions of the contracts which

Houston has with its producers that it shall not sell the gas in manners which would subject the sales to the jurisdiction of the Federal Power Commission. Nothing is being added to the supply of gas to be consumed within the State of Texas, for the same volumes are to be used as presently consumed, and as there is to be no cutback in the sources of supply presently used to supply these stations, it is quite obvious that an additional supply of gas—whether you label it as Houston gas or not—will flow in interstate commerce. Parties may not confer jurisdiction upon the Federal Power Commission by their language in a contract, nor may they avoid that jurisdiction by language selection.

The Court has quite recently rendered a decision which clearly points to the required result in this proceeding. In the case of *Northern Natural Gas Co. v. State Corporation Commission of the State of Kansas* (1963) 372 U.S. 84, 9 L.Ed.2d 601, 83 S.Ct. 646, the Court reaffirmed the now well-established doctrine that:

> "The Congress enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company.'" (p. 607.)

The Court pointed out in a footnote to the statement that, "Persistent efforts to narrow the scope of the broader exclusive federal jurisdiction conferred by the statute have been unavailing."

In refusing to remand the case to the Kansas Supreme Court in order to permit the Kansas court to modify the contract so as to avoid the interstate conse-

quences of the particular contracts, the Supreme Court stated at page 611 of 9 L.Ed.2d:

> "For, if the federal question could be avoided or postponed just short of actual collision, by ad hoc accommodation on the part of every State, then the scope of federal regulatory power would vary in accordance with the kaleidoscopic variations of local contract law."

Nor should "the scope of federal regulatory power . . . vary in accordance with the kaleidoscopic variations of . . . contract" provisions which do not affect the actual flow of gas in interstate commerce. The actual flow of Houston, Lo-Vaca gas in interstate commerce will be precisely the same regardless of what use of the gas is provided for in the contracts. Accordingly, it would be a mockery of our judicial system to hold that the flow of regulatory power over the flow of the Houston Lo-Vaca gas in interstate commerce will vary in accordance with the kaleidoscopic variations of contract provisions.

As pointed out by this Court in the *Northern Natural* case, *supra* (footnote 9, p. 607):

> " 'Attempts to weaken this protection of consumers against exploitation at the hands of natural gas companies by amendatory legislation exempting independent natural gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language.' "

If the purposes of the Natural Gas Act are to be achieved, the split decision herein by the Court of Appeals must be reversed.

IV.

The Same Issues Here Will Recur and Are Pending In Another Circuit Court.

Considering the rapid growth of the natural gas consumption and the ever-expanding development of natural gas resources, it seems clear that this troublesome question is apt to recur, particularly if the protective jurisdiction of the Federal Power Commission may be avoided by language selection. At the present time, there are outstanding at least two Federal Power Commission decisions which are based in part upon its prior opinion in this case. They are its *Montana-Dakota Utilities* Decision (No. 395, dated July 15, 1963, unreported) and its *United Gas Pipe Line* Decision (No. 401, dated August 26, 1963, unreported). The *Montana-Dakota Utilities* Decision is presently pending in the United States Court of Appeals for the Eighth Circuit (No. 17445 and No. 17492).

That the probable recurrence of a troublesome question based upon a federal statute is proper ground for a grant of Certiorari by this Court was established in *United States v. Standard Oil Company of California*, 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947).

Conclusion.

The ruling below invokes uncertainty into the Natural Gas Act and makes its administration by the Federal Power Commission haphazard and inconsistent, leaving the consuming public without the protection which Congress intended and to which this Court has held it is entitled. The Federal Power Commission has the authority and commensurate duty imposed on it by the Natural Gas Act to regulate the sales for resale in interstate commerce involved in this proceeding. This Petition for a Writ of Certiorari should, therefore, be granted to settle the issue with finality.

Respectfully submitted,

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By JOHN ORMASA

March 13, 1964.

APPENDIX A.

Opinion and Order Determining Jurisdiction.

Lo-Vaca Gathering Company, Docket No. CI60-693; Houston Pipe Line Company, Docket No. CP61-177.

(Issued October 23, 1961)*

Before Commissioners: Joseph C. Swidler, Chairman; Jerome K. Kuykendall, L. J. O'Connor, Jr., and Charles R. Ross.

Swidler, Chairman:

As set forth by the presiding examiner in his decision issued August 11, 1961, these proceedings concern the question whether we would have jurisdiction under the Natural Gas Act over proposed sales of natural gas by Lo-Vaca Gathering Company and by Houston Pipe Line Company to El Paso Natural Gas Company. The proceedings arose by Lo-Vaca's filing on June 1, 1960, CI60-693, of an application for a certificate of public convenience and necessity and the filing by Houston on December 27, 1960, CP61-177, of a petition for a declaratory order under Section 16 of the Natural Gas Act to remove uncertainty as to our jurisdiction over Houston's proposed sale.

The sales in issue here are purportedly designed to provide additional gas supply to be used by El Paso for the operation of its compressors and the gasoline plant of Phillips Petroleum Company in Ector County, Texas. El Paso comprises a large pipeline system which extends from the Permain Basin in Mexico and Texas by means of two large pipelines through New Mexico and Ari-

*Designated Commission Opinion No. 348; Initial decision appears on P. 617; rehearing denied by order issued December 12, 1961, 26 FPC ——.

zona to the border of California. Recently it acquired an additional pipeline extending from New Mexico to the Pacific Northwest. The greater part of its gas supplies is sold to its California customers at the border of that state.

In another proceeding, Docket No. CP60-101, El Paso Gas Supply Company, a wholly owned subsidiary of El Paso, filed with the Commission an application for a certificate authorizing it to construct a compressor station to be known as the Coquat Station located near the community of Three Rivers in Live Oak County, Texas, and a 30-inch pipeline approximately 227.6 miles in length, extending from the Coquat Station to a point of connection with El Paso's system at its Sonora Plant in Sutton County, Texas. At Coquat, the Supply Company would receive for the account of El Paso the gas proposed to be sold by Lo-Vaca and Houston, all of which, it is stated, would be produced in Texas.

Lo-Vaca is a Texas corporation of Corpus Christi, Texas, and a wholly-owned subsidiary of Coastal States Gas Producing Company, but at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract, which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf.[1] There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises

[1]The level of the rate is not in issue at this stage in the proceedings.

over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

> All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

Houston is a Texas corporation of Houston, Texas, and a wholly-owned subsidiary of the Houston Natural Gas Corporation. Since 1925, it has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a

formula which, if applied to the billing month of November, 1959, would have produced 19.5¢[1] plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, "El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas." El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

The record shows that gas received by El Paso at Coquat from La-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other

portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

El Paso proposed in Docket No. G-18616, now pending before the Commission, to supply its mainline compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6,001 M²cf per day and on a maximum day would exceed the supply by 31,879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An esti-

mated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21,373 M²cf per day on an average day and by 36,549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California.

After the filing of briefs, the examiner issued his decision on August 11, 1961. He found that Lo-Vaca's sale would be subject to the Commission's jurisdiction but that Houston's sale would not be. With respect to Lo-Vaca, he concluded that the Commission's decision in *Oklahoma Natural Gas Co.*, 23 FPC 291, and order denying rehearing, 23 FPC 531, were controlling. On the other hand he felt that the sale by Houston was controlled by the Commission's recent decision in *Shell Oil Company, et al.*, Docket Nos. G-5029, *et al.*, issued June 30, 1961, 25 FPC 1316.

Lo-Vaca, the Public Utilities Commission of California, Southern California Gas Company and Southern Counties Gas Company of California, and our staff filed exceptions to the examiner's decision. Lo-Vaca, citing authorities, argues that its sale to El Paso of gas contractually restricted for consumption in its fa-

cilities in New Mexico and Arizona would be a direct sale not subject to this Commission's jurisdiction. It emphasizes that this gas was the subject of a separate contract, that purchases from Lo-Vaca and deliveries to El Paso's facilities were separately metered, and that El Paso would consume as fuel volumes of gas in excess of the volumes received from Lo-Vaca. It contends that the commingling of the restricted use gas with gas intended for resale would not prevent the sale from being nonjurisdictional as a direct sale, although, of course, it admits the gas would be transported in interstate commerce. The California Commission and our staff objected to the examiner's failure to find jurisdiction over Houston's sale to El Paso. The California Commission argues that the contractual expressions of intention cannot override the physical fact of interstate transportation and sale. It expresses the fear that if some of the gas purchased by a pipeline could be restricted in the manner herein contemplated, the Commission would lose control over a substantial portion of field prices, and there would result uneconomical expenditures on the part of the pipelines in order to attach reserves for the intrastate market. It contends further that consumers of the interstate gas would ultimately have to bear any higher price for compressor fuel gas not subject to our regulation.

The staff's position is that Houston's sales and Lo-Vaca's sales would be subject to our jurisdiction and that this cannot be avoided by contractual restrictions on the gas sold. The staff argues that the Houston and Lo-Vaca gas would flow in continuous movement from Texas to markets in other states where it would be resold and the fact that Houston's and Lo-Vaca's

gas would be mixed in El Paso's facilities with gas from other sources would have no effect on the jurisdictional status of Houston's and Lo-Vaca's sales. The staff argues further that it is not logical to treat Houston's sales as non-jurisdictional and Lo-Vaca's sales as jurisdictional and that we are not authorized to put into the hands of buyers and sellers of gas the power to determine by contract the jurisdictional status of their sales. To do so the staff contends would create a serious regulatory gap. Likewise, among other points, the two southern California companies contend that Houston's gas would be mixed with other gas and would flow outside of Texas to California and the sale of this gas would not be removed from our jurisdiction because of a contractual device.

On this record, the briefs, the examiner's decision and the exceptions, the question before us is whether contractual arrangements and the intentions of the parties can segregate Lo-Vaca's and Houston's gas sold to El Paso from other gas received by El Paso regardless of physical commingling, the actual destination of the gas, and the operations of El Paso's system. In our opinion, as discussed below, such a segregation would not be achieved here and both sales would be subject to our jurisdiction.

The Natural Gas Act as shown in Section 1(b) applies "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use * * * but shall not apply to any other transportation or sale of natural gas * * *." It is clear enough that physically the specific gas sold by Lo-Vaca and Houston

would actually in part be resold to customers outside of Texas and it would be physically impossible to restrict the consumption of this gas to El Paso's facilities either inside or outside the state. It would be contrary to the facts to assume that the restricted gas would go only to the compressor stations, while other gas purchased by El Paso would be sold for resale. Thus, literally, the gas sold by Houston and Lo-Vaca would come within the wording of the statute as sold in interstate commerce for resale.

In reaching this conclusion, we are cognizant of the fact that there exist in the natural gas industry arrangements whereby companies transport natural gas for other companies, commingling it with gas from various sources. Although under some of the transportation arrangements, gas is purchased by the ultimate recipient directly from producers, generally there is no earmarking of specific gas to the ultimate destination. The delivering company is simply obligated to deliver a specified volume. In such a case, the volume of gas purchased may be compared to a "contract demand volume" since there is no earmarking of any volume as delivered from a particular source. It is not our intention by this opinion to disturb such transportation arrangements. What we say in this opinion relates only to what constitutes interstate commerce and our jurisdiction under the Natural Gas Act.

It is well settled that the business of selling and transporting gas, electric energy and other goods from one state to another constitutes interstate commerce. This is true of a sale of grain in one state which is to be transported by the buyer to another state. *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 55; *Dahnke-Walker*

Co. v. Bondurant 257 U.S. 282, 290, as well as the auction of tobacco to be transported by the buyers to points outside the state, *Currin v. Wallace*, 306 U.S. 1, 10, and the purchase of cattle transported from another state, *Swift and Co. v. United States*, 196 U.S. 375, 398-399, where Justice Holmes said, "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." Sales of gas by interstate pipeline systems are sales in interstate commerce where the gas sold has been produced in another state even when mixed with gas produced in the same state. *Missouri v. Kansas Gas Co.*, 265 U.S. 298, 306; *P.U.C. of Kansas v. Landon*, 249 U.S. 236, 245. When such sales are for resale, they are subject to our jurisdiction. *Panhandle Eastern Pipe Line Co. v. Comm'n.*, 332 U.S. 507, 516-517; *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 582. In the latter case, the Court said:

> The sale of gas originating in one State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress

The same conclusion applies to sales of electric energy generated in another state although mixed with energy generated in the state of sale. *Pennsylvania Water and Power Co. v. F.P.C.*, 343 U.S. 414; *Wisconsin-Michigan Power Co., v. F.P.C.*, 197 F. 2d 472 (CA7), *certiorari* denied 345 U.S. 934. Sales of electric energy in the state of generation where the energy is to be transmitted out of the state and consumed in another state are also in interstate commerce. *Public Utilities Comm. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83;

Hartford Electric Light Co. v. F.P.C., 131 F. 2d 953 (CA2), *certiorari* denied 319 U.S. 741. In *Jersey Central Co. v. F.P.C.*, 319 U.S. 61, 71-72, it was said:

> If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile.

Of particular relevance to this proceeding, it has been held in many cases that a sale of gas in the producing state where the gas is to be transported and sold for resale in another state is a sale in interstate commerce and subject to our jurisdiction. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682-684; *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 687-688; *Saturn Oil & Gas Co. v. F.P.C.*, 250 F. 2d 61 (CA10) *certiorari* denied 355 U.S. 956; *Continental Oil Co. v. F.P.C.*, 247 F. 2d 904 (CA5); *Deep South Oil Co. v. F.P.C.*, 247 F. 2d 882 (CA5),[2] *Shell Oil Co. v. F.P.C.*, 247 F. 2d 900, 903 (CA5), *certiorari* denied 355 U.S. 930. In the *Phillips* case the Court said (347 U.S. at p. 682):

> * * * we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company.

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[2]Certiorari was in effect denied in companion *Shell* case next cited.

In the *Saturn* case, which involved wellhead sales of natural gas to two interstate pipelines by a small unintegrated oil company, the court said:

> The Phillips decision holds that the Act applies to all wholesales by producers. Saturn may not escape regulation because of its size or because of the restricted nature of its operations.

Deep South is also a small unintegrated producer of oil and gas selling gas to a gatherer and processor which, in turn, sells Deep South's gas, mixed with other gas, to an interstate pipeline. The court said in reply to a contention that the Deep South's sales were made for manufacture not resale (247 F. 2d at p. 888):

> The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently, there can be no question that petitioner is making sales for resale within the meaning of the Act.

We are of the opinion that the principles expressed in these cases are not changed by the contractual provisions with respect to the disposition of the gas here involved. It is the "nature of the beast" not the label that is controlling. It has been held that whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract. *Atl. C.L.R.R. v. Standard Oil Co.*, 275 U.S. 257, 268; *B.&O.S.W.R.R.Co. v. Settle*, 260 U.S. 166, 170. With respect to the Federal Power Act which is similar to the Natural Gas Act, the Supreme Court has said, "Federal jurisdiction was to follow the flow of electric energy, an engineering and

scientific, rather than a legalistic or governmental test" *Connecticut Light & Power Co. v. F.P.C.*, 324 U.S. 515, 529.

In *Shell Oil Co. v. F.P.C. supra*, gas was sold to Phillips which processed it, removed liquefiable hydrocarbons and resold the residue gas to El Paso. In attempting to refute our jurisdiction Shell relied on its contract with Phillips providing that the gas was conveyed to Phillips for the purpose of manufacturing gasoline. The court pointed out that there was actually no restriction on the disposition of the residue gas, and added (247 F.2d at p. 903):

> But be this as it may, the legal determination of the question rests not upon the parties' use of the word "manufacture", but upon the actual disposition of the gas.

In addition to the above considerations, the character of sales by Houston and Lo-Vaca is shown by the nature of El Paso's operations. El Paso is engaged in an enterprise extending from Texas to California and from Mexico to Canada. The record in this case shows that its gas produced or purchased in Texas goes to a number of possible destinations. Some is consumed in Texas, but most of it is transported out of the state in El Paso's pipeline system to be consumed in pipeline facilities or resold in New Mexico, Arizona or California. The contractual provisions, of course, do not alter these physical facts. Neither is the situation altered by El Paso's proposal to build a 16-inch line west from its Keystone compressor station so that there would be a line wholly in Texas by which fuel could reach its Texas compressor stations for the Houston gas commingled with other gas in El Paso's main line

would physically move out of Texas although some portion might travel through the proposed 16-inch line.

The way in which El Paso operates its system in transporting its gas from the sources of supply to the points where it is needed as discussed in part above, demonstrates that the system must be considered as a whole and that it has the primary purpose of moving gas from the Permian Basin and other sources to consumers in a number of states. In *El Paso Natural Gas Co.*, 22 FPC 260, 277, 278,[3] we found that El Paso operated an integrated natural gas pipeline system and that it would be discriminatory to determine just what gas goes to each of the several customers. In our opinion the sale of gas to this interstate system, which would be used for system purposes and, at least in part, would leave the state and be sold for resale and consumed outside the state, would be subject to our jurisdiction. The situation may be compared in reverse to our decision in the *Penn Water* case.[4] There we found that sales in Pennsylvania by an integrated electric system were sales in interstate commerce and subject to our jurisdiction, although part of the energy sold had been generated in the same state. The gas to be sold to El Paso by Lo-Vaca and Houston would be isolated only by the terms of the contracts but actually would become system gas along with the gas of other producers who did not receive this contractual treatment.

While the El Paso system provides a good example of an integrated system and this fact supports our con-

[3]Remanded on other grounds as *El Paso Natural Gas Co. v. F.P.C.*, 281 F. 2d 567, (CA5) *certiorari* denied 366 U.S. 912.

[4]8 FPC 1, affirmed as *Pennsylvania Water and Power Co. v. F.P.C.*, 343 U.S. 414; see also *Kentucky Natural Gas Corp. v. P.S.C.*, 28 F. Supp. 509 (D.C.E.D. Ky.), aff'd 119 F. 2d 417 (CA6).

clusion here, we would reach no different result if the sales were to a single line system where physically the gas was mixed with other system gas and was physically transported out-of-state and sold in interstate commerce for resale. In this hypothetical situation, the gas sold would still be transported from one state to another and sold for resale, regardless of attempts by the parties, in their agreements with each other, to isolate and exclude such gas from our jurisdiction. As shown by the cases cited above, the touchstone to the question whether a sale of gas is for resale in interstate commerce is what is done with the gas, not what the parties may say about the transaction, verbally or in writing. Again we may say that the parties are not prevented by our conclusions here from entering into private arrangements with respect to the division of the gas or the ownership of the gas, but these arrangements will not prevent our jurisdiction attaching.[5]

If we reached a conclusion different from that above, our regulation of gas rates would be handicapped. It would be possible, as in this case, for a pipeline to offer to purchase gas at a higher price that we would otherwise allow in the area upon the assertion that it would use this gas in its compressors or would deliver it to its intrastate customers even though the gas would actually be received into its general system transportation facilities and used for every system purpose. It would be possible for a pipeline to discriminate among producers by giving certain ones the privilege of selling to it the gas which by agreement would be deemed to be segregated from the interstate stream and to be re-

[5]Of course, what effect, if any, such arrangements would have on the issuance of certificates, and allocations and rates is not before us.

sold and consumed in the state of production or used in compressor stations. This may increase the cost to interstate customers and at the same time put them at a competitive disadvantage in obtaining additional supplies of gas. While our jurisdiction is limited by the Natural Gas Act, and not by the wider scope of the Constitution, we may note that the sales contemplated here could not properly be regulated by the producing state. They would be sales that concern "more states than one"[6]; they would concern Texas but also New Mexico, Arizona and California and the distribution of the gas to the public whom the Natural Gas Act was designed to protect.

A number of cases have been cited in the briefs of the various parties in support of their contentions but they do not disturb our conclusions. In *U.S. v. Public Utilities Comm'n.*, 345 U.S. 295, we had found that a sale of electric energy by a California company to the Navy at an installation in Nevada was subject to our jurisdiction even though the greater part of the energy was to be consumed by the Navy (and would thus have been exempt from our jurisdiction if it had been a separate transaction) and only a small part was to be resold. The Supreme Court suggested that a separation of the resale and direct sale energy might have been achieved, although that did not show in the record. In this respect the case does not involve an interstate commerce question at all, but a possible segregation between a direct sale and resales. It does not concern the operation of an interstate pipeline, but merely the final consumption and distribution of the electric energy. Moreover, the Commission's jurisdiction was sustained. A similar problem was involved in *City of Hastings v.*

[6]*Gibbons v. Ogden*, 9 Wheat. 1, 194.

F.P.C., 221 F. 2d 31 (CADC), *certiorari* denied 349 U.S. 920, where the court affirmed us in finding that the direct sale of gas to the city for use in its power plant was not subject to our jurisdiction, although commingled with gas sold to the city for resale, where the direct sale gas had been excluded by the terms of the rate schedule applicable to the resale gas. In both these cases the gas or electric energy for the alleged direct sales was to be consumed in the state of sale for local purposes, while Houston's and La Vaca's gas would be sold to a pipeline system to enable it to carry on its interstate business.

The *North Dakota* case[7] presents the most serious problem of distinction. Whether or not that case was rightly decided is an open question.[8] In that case, we found that we did not have jurisdiction over "firm sales" of gas in North Dakota by certain producers to Montana-Dakota Utilities Company. The gas was produced in North Dakota and by contract was to be used in that state. Montana-Dakota was to use part of this firm gas to serve several communities from its line which extended westward into Montana. It was commingled in this line with "dump" gas sold by the same producer to Montana-Dakota under separate contracts to be used in North Dakota and Montana. All of this gas came from one compressor station and was not mixed with other gas from other North Dakota sources. Thus it was possible to measure the intrastate and interstate volumes attributable to the source.

The *North Dakota* case presents a far more limited situation with a single source of supply within the state

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[7] *Montana-Dakota Utilities Co., et al.*, 16 FPC 415 affirmed as *North Dakota v. F.P.C.*, 247 F. 2d 173 (CA8).

[8] See *Oklahoma Natural Gas Company*, 23 FPC 291, discussed below, where the Commission also declined to follow the case.

than that presented here. As can be seen from the citations set forth earlier in this opinion, it runs counter to the whole stream of the decisions of this Commission as to what constitutes a jurisdictional sale in interstate commerce and to the decisions of the Supreme Court construing this and other legislation. To the extent that *North Dakota* may be inconsistent with the action we take here, we believe it was erroneously decided.

In *Oklahoma Natural Gas Company*, 23 FPC 291, 531, we found that a sale by Oklahoma Natural to Consolidated Gas Utilities Corporation where the gas would be delivered into Consolidated's interstate pipeline in Oklahoma would be subject to our jurisdiction even though the companies agreed that an equivalent amount of gas would always be delivered by Consolidated to its customers in Oklahoma. It was, of course, clear that physically some of Oklahoma Natural's gas would be transported in Consolidated's pipeline outside of Oklahoma for resale. We thus held there, as we hold here, that a sale of gas in interstate commerce for resale cannot be transmitted into something else by contractual provisions.

In its exceptions Lo-Vaca contends that the examiner termed it a "pipeline company" in addition to being a "natural gas company". Lo-Vaca proposes to build a system of lines which will receive the gas from the producers, transport it and deliver it at Coquat, but the record is not sufficient to determine here whether it is a "pipeline company" in addition to being a natural gas company and it is not necessary to do so. However, on the basis of such facts as appear in the record, it would appear that both Lo-Vaca and Houston would be pipeline companies.

The Commission further finds:

(1) El Paso is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate commerce of natural gas for resale for ultimate public consumption, and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) El Paso Gas Supply Company upon the completion of the facilities proposed in Docket No. CP60-101 and the commencement of the sales proposed herein by Lo-Vaca and Houston would be engaged in the transportation of natural gas in interstate commerce, and would be a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act.

(3) The sale and delivery of natural gas by Lo-Vaca and Houston as hereinabove described, and as further described in the record and in the application, would result in Lo-Vaca and Houston being engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and Lo-Vaca and Houston thereby would become natural gas companies within the meaning of the Natural Gas Act, and their respective sales to El Paso would be subject to our jurisdiction.

(4) The natural gas facilities proposed to be constructed and operated by Lo-Vaca and Houston, are to be used in the transportation and sale of natural gas in interstate commerce, and hence would be subject to the jurisdiction of the Commission and to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

The Commission orders:

(A) Lo-Vaca's request that the examiner's decision be modified so as to find it would not be engaged in the sale of gas for resale in interstate commerce is hereby denied.

(B) Houston's petition for a declaratory order that neither it nor the sellers of gas to it would be natural gas companies subject to the Commission's jurisdiction under the Natural Gas Act on account of the proposed transactions described above is hereby denied.

(C) Exceptions not granted herein are hereby denied.

(D) The examiner's decision, as modified and to the extent that it is consistent with our findings and order herein is hereby adopted as the decision of the Commission.

Commissioner O'Connor, *dissenting in part,* filed a separate statement.

O'Connor, Commissioner, *dissenting in part:*

Since, in my opinion, the Presiding Examiner's decision should be adopted by the Commission as its decision herein, I dissent from the modification thereof.

In modifying the Presiding Examiner's decision, the majority recognizes that its opinion and order are inconsistent with *State of North Dakota, et al. v. F.P.C., et al.,* 247 F.2d 173 (CA8-1957). Their opinion states that:

> To the extent that the *North Dakota* case may be inconsistent with the action which we take in the instant case, we believe that it was erroneously decided.

The Court of Appeals stated the basis of its *North Dakota* decision as follows (p. 177):

> * * * As found by the Examiner and approved by the FPC, the gas received * * * at Tioga, North Dakota, is broken into two streams, one of which moves eastward in the Tioga-Minot, North Dakota, intrastate line. Clearly that is and can only be intrastate transportation not subject to FPC control. The other stream moves westward [into Montana-Dakota's integrated system, p. 175] but *before crossing any state line* a small portion of it goes off into the laterals serving the four North Dakota towns of Ray, Wheelock, Epping and Springbrook. The gas going into the Tioga-Minot intrastate line and to the four named North Dakota towns is *bought and paid for under the "firm gas" contracts.* We think, then, the gas sold pursuant to such "firm gas" contracts for consumption in North Dakota is clearly distinguishable from the "dump gas" sold in interstate commerce. There is no commingling of interstate with intrastate gas within the State of North Dakota *in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota.* Accordingly, the *quantities* of intrastate gas purchased by Montana-Dakota under the "firm gas" contracts are easily identifiable and determinable. [Emphasis supplied.]

In that case, as in the Presiding Examiner's decision herein, the metering off within the producing state of

the contract quantities of intrastate gas before any of the gas stream had crossed a state line was held to be a clearly distinguishable separation despite the commingling thereof in said stream with other locally produced gas destined for interstate transportation and sale.

As to such commingling, the Court said in *North Dakota* (p. 176):

> * * * The fact that this ["firm"] gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9¢ "dump gas" interstate contracts does not convert the 16¢ "firm gas" contracts into interstate contracts.

Obviously, under the physical flow theory applied by the majority herein, some molecules of the "firm gas" in the stream in the *North Dakota* case flowed into Montana for resale and the "firm gas" contracts thus could not have been held to be outside our jurisdiction. Hence, the necessity for them to depart herein from the judicial precedent established by the *North Dakota* case. To such a departure, I am opposed.

I agree with the majority that the expense of gas purchased for compressor use by interstate pipeline companies, as well as all other expenses of these companies, should be subject to our review and possible disallowance for ratemaking. However, I do not feel that the necessity for such review of these relatively small amounts of gas requirements is sufficient cause for the development of such a broad policy as that enunciated by the majority in this case.

In my opinion, the decision of the majority would effectively preclude the use of interstate pipeline company facilities for intrastate transmission of natural gas within the producer states for the use of the consumers and industries in those states without the producers of such gas being subject to the jurisdiction of the Federal Power Commission. It seems to me this is an unnecessarily harsh imposition on the consumers in the producing states whose resources and statutes have been availed of to permit the construction and operation of these interstate lines. There may be good and sufficient reasons (not the least of which is the cost of complying with regulatory reporting requirements) for many producers to avoid subjecting themselves to the jurisdiction of the Federal Power Commission.

It appears to me that the advantage to interstate pipeline companies of the flexibility in disposing of surplus supplies of gas in intrastate commerce, as well as the potential usefulness of these lines in providing intrastate transportation revenues, far outweigh the possibilities of additional costs to interstate consumers.

DECISION

Upon Application and Petition to Declare Certain Restricted-Use Gas Contracts to be Nonjurisdictional

(Issued August 11, 1961)

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A. SYLLABI OF POINTS DECIDED

1. The proposed sale and delivery in Texas of gas produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas will not become a sale in interstate commerce because it is to be moved in a commingled stream with other Texas-produced gas destined for interstate commerce, where the respective volumes of interstate and intrastate gas are metered and known and the intrastate gas is separated from the commingled stream before any of the stream containing the interstate gas leaves Texas.

2. The producer and gatherer of such wholly intrastate gas will not become a natural-gas company because of its intrastate sale and delivery of such gas to a natural gas pipeline for local fuel consumption.

3. The sale and delivery in Texas of gas produced wholly in Texas, but to be transported outside of Texas, in commingled stream with Texas and New Mexico gas destined for resale in interstate commerce for ultimate public consumption, and to be consumed outside of Texas will be a sale in interstate commerce because the gas will have entered the stream of interstate commerce and will have passed across the Texas border where some portion thereof will be resold to consumers outside of Texas despite the contractual obligation of the natural gas pipeline purchaser to draw from the stream an equal amount of gas for fuel in its compressor stations located beyond the Texas border.

4. The producer and gatherer of such gas destined for transportation and sale in interstate commerce will be a natural-gas company subject to the Natural Gas Act because of its interstate sale and delivery thereof to a natural gas pipeline company.

B. INTRODUCTORY STATEMENT

Freer, *Presiding Examiner:* This case involves the question as to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act (Act) over certain proposed sales and deliveries of natural gas to a natural-gas pipeline company, by two producers and/or gatherers thereof, at least one of them and the pipeline company being natural-gas companies subject to the jurisdiction of the Commission under the Act. The question arises out of an application filed by Lo-Vaca Gathering Company (Lo-Vaca) on June 1, 1960, in Docket No. CI60-693 for authority to sell and deliver natural gas to El Paso Natural Gas Company (El Paso) pursuant to the provisions of two certain contracts more particularly described below and a petition for a declaratory order pursuant to Section 16 of the Act filed by Houston Pipe Line Company (Houston) on December 27, 1960, in Docket No. CP61-177.

C. HISTORY OF THE PROCEEDING

1. The Filings on Which Hearing Was Held

(a) In the application filed by Lo-Vaca on June 1, 1960 (Item A), the applicant seeks authorization not only for the "gathering and sale" of natural gas (including construction of necessary facilities) pursuant to an admittedly jurisdictional (Tr. p. 24) contract entered into on May 16, 1960, but also, for the "gathering and delivery" of natural gas pursuant to a contract dated March 15, 1960, for El Paso's fuel consumption outside of Texas (Tr. p. 46), both by the Applicant and El Paso Natural Gas Company and as more particularly hereinafter described.

(b) In the petition filed by Houston on December 27, 1960, pursuant to Section 16 of the Act, the petitioner seeks a declaratory order to remove uncertainty as to the Commission's jurisdiction over its proposed sale and delivery of natural gas to El Paso for El Paso's fuel consumption in Texas pursuant to a contract entered into on July 19, 1960 (Ex. 2), as more particularly hereinafter described.[1]

On February 24, 1961, the Commission issued an order consolidating and setting down for hearing the application and petition above described and limiting the hearing (and disposition) to the question of the jurisdiction of the Commission over the sales and deliveries described in the said restricted-use (fuel consumption) contracts of March 15, 1960, and July 29, 1960, respectively.[2]

II. The Filings in Related Pending Proceedings

(a) There is pending before the Commission an application by El Paso Gas Supply Company[3] (Supply), a wholly-owned subsidiary of El Paso, filed with the Commission, on May 13, 1960, in Docket No. CP60-101, for a certificate of public convenience and necessity authorizing it to construct and operate a natural

[1]On Ex. 1, a "System Map, Houston Pipe Line Company" is shown the construction contemplated by Houston and El Paso Supply Company in connection with Houston's sale and delivery of gas to El Paso. (Tr. p. 106-7.)

[2]Commissioner Kline, dissenting, stated that in his opinion no hearing was necessary and that he favored an order holding the sales to be intrastate and not within the Commission's jurisdiction. 25 FPC 329.

[3]Supply's petition for intervention herein was denied March 30, 1961, on the ground that its and El Paso's interests both would be protected by El Paso's intervention, which had been granted on March 15, 1961.

gas transmission system for transportation of the gas to be received from Lo-Vaca and Houston near Three Rivers in Live Oak County, Texas, for El Paso; which after compression is to be transported through 227.6 miles of proposed 30" pipeline from there to a connection with El Paso's Sonora Plant in Sutton County, Texas (Exs. 5-A, 6, 7, 8, 9, 10; Item D). Under contractual arrangements not yet completed, El Paso will sell to Supply sufficient Houston gas to fuel and operate the facilities proposed to be constructed and operated by Supply. (Tr. pp. 268-69; Ex. 7; Item D, Sch. 1.)

III. The Interventions

Petitions to intervene filed by El Paso, Pacific, Southern California Gas Company and Southern Counties Gas Company of California (California Distributors), Transwestern Pipe Line Company (Transwestern), The People of the State of California and Public Utilities Commission of the State of California (California), were granted by order of March 15, 1961, and these intervenors participated in the hearings.[4]

Other petitions to intervene, filed by Supply and Texas, were denied by order of March 30, 1961; prior to said order, however, the privilege of limited participation had been allowed to these companies. (Tr. pp. 4, 7.)

IV. The Hearings

Pursuant to the Commission's Order for Hearing and Consolidating Proceedings, issued February 24, 1961, a public hearing before the undersigned hearing

[4]Pacific and Transwestern, while represented by Counsel at the hearings, neither cross-examined witnesses, nor offered evidence nor filed briefs.

examiner was convened on March 21, 1961, and sessions were held also on March 22 and April 10, 1961.

Opportunity to file briefs was afforded all parties, and opening and reply briefs favoring exemption from jurisdiction were filed by Lo-Vaca, Houston and El Paso; the Staff, California and California Distributors (other than Pacific) filed briefs in opposition to exemption. In all, 242 pages of briefs were filed, 89 pages for exemption and 153 pages in opposition.

D. THE ISSUES

1. Limitation of Issues by Order of February 24, 1961

The Commission's Order for Hearing and Consolidating Proceedings, issued February 24, 1961, provided in pertinent part:

> (A) A public hearing, limited to the question of the Commission's jurisdiction over the proposed sale of gas by Houston for use as fuel in El Paso's facilities in Texas and in Phillips' gasoline plant in Ector County, Texas, and over the proposed sale of gas by Lo-Vaca for use as fuel in El Paso's facilities outside Texas, will be held * * *.
>
> (B) The proceedings under the docket numbers in the caption hereof are hereby consolidated for hearing and disposal.

The issues are whether Lo-Vaca's and Houston's proposed sales and deliveries of gas to El Paso under the contracts of March 15, 1960, and July 29, 1960, are subject to the jurisdiction of the Commission or whether such proposed sales and deliveries of either of them are exempt therefrom by reason of the provisions of the restricted use contracts employed in making

them. Since there is general agreement among the parties and the witnesses that some part of the gas proposed to be sold and delivered for fuel consumption in Texas[5] as well as a part of that proposed to be sold and delivered by Lo-Vaca for fuel consumption outside of Texas, inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California, any exemption found for these sales, or either of them, must be rested on those provisions of the contracts which seek to avoid jurisdiction.

II. Contentions of the Parties

(a) Lo-Vaca's position (Initial Brief, pp. 3-5) is as follows:

> * * * The sale is a direct sale to El Paso for its use in its own facilities, and as such, is not within the Commission's jurisdiction * * * direct sales of natural gas, being other than sales for resale, are not within the Federal Power Commission's jurisdiction under the Natural Gas Act. * * *
>
> * * * * * *
>
> Lo-Vaca's gas * * * will be commingled in El Paso's interstate pipeline, in order to transport it to the facilities where it will be consumed. However, the fact that natural gas which is the subject of a non-jurisdictional direct sale is transported in a commingled state with natural gas which is being sold in interstate commerce for resale and thus jurisdictional does not cause the non-jurisdictional

[5]El Paso's Reply Brief, p. 2, for example, states: "El Paso's argument * * * assumes that some of the molecules of the Houston gas will pass outside of Texas." (Cf. Tr. pp. 332, 343-44.)

character of the former sale to be lost where the non-jurisdictional sale takes place in a separate and distinguishable form. * * *

(b) Houston's position is stated in its Reply Brief (pp. 4-5) as follows:

> Houston's position is: *A sale of gas, even for resale, with a contractual obligation that it be consumed in the state of production is not jurisdictional even though the gas be commingled with gas which has not yet but eventually will be transported beyond the state of production.* [Emphasis supplied by Houston.]

(c) El Paso's position is "that the restricted use contracts are non-jurisdictional" (Initial Brief, p. 3), which position is amplified in its Reply Brief (p. 2) as follows:

> * * * there is no dispute * * * that "following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed [as fuel] or remained in the commingled stream (R. 344)." * * * [and] (R. 332, 343) that there is no assurance that the specific molecules of gas sold to El Paso by either Houston or La Vaca will be consumed as fuel in El Paso's compressor stations * * * the case law unequivocally holds that preservation of the separate molecular identity of certain purchased gas throughout its transportation is not essential to a determination that it remains in *intrastate* commerce although it becomes a part of a commingled stream, the rest of which may be in *interstate* commerce. * * *

Particularly so (Reply Brief p. 2) with respect to the Houston gas:

> * * * extraction of the gas of Houston as such is *not* essential to the consumption of the gas of Houston solely as fuel in Texas in any meaningful legal sense * * *. [Emphasis supplied by El Paso.]

(d) The Commission Staff states "the principal legal question presented" (Brief, p. 1) to be:

> * * * whether a seller and a buyer of natural gas can prevent, by contract, sales of natural gas from being subject to FPC jurisdiction when the gas flows in continuous movement from State to State, commingled with gas from other sources, with gas from the commingled stream being resold for ultimate public consumption.

Staff's contentions as to this question are stated in its brief (pp. 11-12), as follows:

> * * * the sales of gas proposed by Lo-Vaca and Houston will be sales in interstate commerce for resale and, therefore, they will be subject to FPC jurisdiction. Lo-Vaca and Houston, however, contend that the contract provisions * * * limiting the use of gas will prevent the sales made under their said contracts with El Paso * * * from being sales in interstate commerce for resale and will forestall FPC jurisdiction. They do not claim that, absent such contractual limitations on use, their gas sales would not be in interstate commerce for resale and would not be subject to FPC jurisdiction. To the contrary, the avowed purpose of including in their contracts the limitations on use of gas was to circumvent jurisdiction.

(e) California's position, so far as it is pertinent to the limited issue herein presented (*infra*, footnote No. 10), is stated in its brief under "Conclusions" (pp. 12-13), as follows:

> * * * in addition to the fact that some of the gas will mix with out-of-state gas prior to use even under the best conditions, *it is impossible to assure that the gas purchased will be used as specified, and some, necessarily, will be transported out-of-state and resold.*
>
> It is likewise obvious that both "restricted" and "unrestricted" gas will be used interchangeably. When intake of one is cut down, the other will increase, and *vice versa*. Complete integration in supply is not only likely, but essential. El Paso's system requirements demand it. [Emphasis supplied by California.]

(f) California Distributors, (other than Pacific) state their concept of the issues in their joint brief (p. 18) as follows:

> The basic issue to be determined in this jurisdictional proceeding is whether the jurisdiction of the Federal Power Commission depends upon the actual flow of a commingled supply of natural gas in interstate commerce, or whether the question of jurisdiction is determined by whether a contract provides for the use of this commingled gas for non-jurisdictional purposes although physically, regardless of the contractual provision, the commingled gas must flow in interstate commerce. Stated in another fashion, the issue is as to whether the jurisdiction of this Commission is dependent upon fact

rather than fiction, upon *actual flow* rather than upon *contractual flow*. [Emphasis supplied by California Distributors.]

Their conclusion as to the interstate nature of the transactions is stated in said joint brief (p. 32) as follows:

From the moment that Houston and Lo-Vaca gas is received into the El Paso interstate pipeline system at Three Rivers, Texas, such gas will form a portion of a commingled supply of gas flowing in interstate commerce * * * (Cf. Exhibit A to said brief).

E. THE FACTS IN EVIDENCE

1. Corporate Status and Present Operations

(a) *Lo-Vaca* is a Texas corporation with its principal place of business in Corpus Christi, Texas (Item A). It "was organized to purchase, gather and deliver gas to El Paso" with which it has two contracts, executed on March 15, and May 16, 1960, respectively.[6] (Tr. p. 8.)

Lo-Vaca owns no facilities and engages in no operations; its operations including the proposed deliveries to El Paso will take place only when the facilities proposed to be constructed by Supply (Docket CP60-10) and by Lo-Vaca (Docket CI60-693) are authorized and completed.

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[6]The May 16 contract is admittedly subject to the Commission's jurisdiction (Tr. pp. 21-24); but the March 15 contract is claimed to be exempt, because the gas is to be used by El Paso solely as fuel in El Paso's compressors and other facilities outside of Texas enroute to which said gas will be commingled with other gas being transported in El Paso's pipeline system (Tr. pp. 8-9).

(b) *Houston* is a Texas corporation having its principal offices in Houston, Texas (Petition p. 1). It is a wholly-owned subsidiary of Houston Natural Gas Corporation, which (like Houston) has been engaged for some years in a wholly intrastate business (Tr. pp. 104, 106).

Since 1925 Houston has engaged in the purchase, transportation and sale of natural gas within the State of Texas (Tr. p. 104). Currently, it delivers about 500,000 Mcf daily to local distribution companies for resale for consumption in various Texas communities and to industrial and commercial consumers located in the Texas Gulf Coast (Ex. F) area. Many of its purchase contracts contain a jurisdictional escape clause. (Ex. 4; Tr. pp. 15, 109, 111, 128-29.)

There are no present deliveries of Houston gas to El Paso. Deliveries are not physically possible until completion of construction by Houston and Supply; and they are not contractually possible until and unless the Commission declares that Houston's contract with El Paso "is a non-jurisdictional transaction." (Tr. p. 16; Ex. 2, p. 6.)

II. The Gas Sales Contracts

(a) *Lo-Vaca-El Paso jurisdictional contract of May 16, 1960.* By this admittedly jurisdictional (Tr. p. 24) contract,[7] Lo-Vaca agrees to sell and deliver 50,000 Mcf[8] average per day (at 14.65 ± psia of natural gas

[7]This sale of gas for which Lo-Vaca seeks a certificate of convenience and necessity, is herein involved only because of its effect on El Paso's task of separating this jurisdictional gas from the Lo-Vaca restricted use gas to be delivered to El Paso in a commingled stream with it and with Houston's restricted-use gas.

[8]Letter agreement (Ex. H) has been negotiated to increase this quantity to 80,000 Mcf. (Tr. pp. 207-08, 213-16.)

to El Paso at or near Three Rivers, Texas, at which delivery point title thereto vests in El Paso. The contract, which is free of all restrictions upon interstate transportation and resale in interstate commerce by El Paso (Tr. pp. 8, 21-24), is for 20 years at an initial price of 22¢ per Mcf, plus certain taxes, and escalating to 26¢. El Paso agrees to "take or pay" for certain minimum volumes, and Lo-Vaca agrees to dedicate reserves in the Texas Gulf Coast area to the performance of the contract.

(b) *Lo-Vaca-El Paso restricted use contract of March 16, 1939 (sic.)*—This contract is substantially identical with the May 16 jurisdictional one, being likewise for 20 years for like volumes at like pressure and like prices and with like take-or-pay provisions and like dedication of reserves.

The important difference is that, in addition to the employment therein of the words "gathering and delivery," in lieu of the "gathering and sale" appearing in the May 16 contract, this contract provides in Article X, Section 2:

> It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale.

Also, in Article XVI it is provided that—

> All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

By letter filed with the Commission on November 25, 1960 (Tr. pp. 23-24), Lo-Vaca states its intention to deliver the contractual quantities under both contracts, reserving its right to contest with respect to jurisdiction over the sales of the restricted use gas. (Tr. p. 9.)

(c) *Houston-El Paso restricted use contract of July 19, 1960*—Reciting El Paso's desire to purchase gas for consumption in Texas as fuel in its facilities and in the operation of Phillips' gasoline plant in Ector County, Texas, this contract for 70,000 Mcf per day is for 20 years, subject to earlier termination. As with the Lo-Vaca contract, this gas is to be delivered by Houston to Supply (for El Paso) at or near Three Rivers, Live Oak County, Texas, and El Paso will take title thereto at said point of delivery. Sales are to be on an interruptible basis (Article XV). The price is to be determined according to a formula which, if applied for the billing month of November 1959, would have produced a price of 19.5¢ plus certain taxes for each unit of one million BTU. (The gas to be of not less than 950 BTU per cubic foot.) El Paso agrees to pay for the 1,000 Mcf per day if available whether or not taken.

Restriction on the use of the gas is stated in Article II as follows:

> 2.1 * * * Accordingly, it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant

and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. El Paso shall advise Houston as to each such utilization to be made of the gas purchased hereunder, and no new or different utilization of such gas shall be made by El Paso without the prior written consent of Houston. El Paso further covenants and agrees that at no time during the term of this agreement will El Paso take from Houston a quantity of gas in excess of the quantity of gas being consumed at the same time in Texas by El Paso for uses agreed to hereunder by Houston. If, by inadvertence or mistake or for any other reason, El Paso shall at any time during the term hereof take from Houston hereunder a greater quantity of gas than is being so utilized, El Paso covenants that the same shall be sold or utilized by El Paso solely in intrastate commerce for use and consumption within the State of Texas.

2.2 El Paso covenants that all components of El Paso's plant consuming fuel gas hereunder shall physically be located on its system of pipe lines and laterals within the State of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the originating delivery point defined hereunder. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volume of gas contributed into the commingled stream at Three Rivers by Houston. * * *

III. The Proposed Operations and Flow of Gas

(a) *Lo-Vaca*—Under both the unrestricted and restricted use contracts, gas will be produced and/or gathered by Lo-Vaca at wellheads in the field (in Texas, Tr. pp. 24-26) and delivered (for El Paso) by Lo-Vaca in a commingled stream (Tr. pp. 266-67), to Supply's proposed Coquat Compressor Station at or near Three Rivers, Live Oak County, Texas.

(b) *Houston*—The Houston gas will be gathered by Houston at wellheads in the field (in Texas, Tr. p. 104), and delivered (for El Paso) to Supply's proposed Coquat Compressor Station at or near Three Rivers, Texas, for transportation by Supply to El Paso at Sonora, Texas. At that station, Houston's gas will be commingled with the commingled stream of Lo-Vaca gas (Tr. pp. 266-68).

(c) *Supply*—Houston's gas will be separately metered before it is commingled at Coquat Station with Lo-Vaca gas (Tr. p. 268) for transportation by Supply in a commingled stream with Lo-Vaca gas (including Lo-Vaca's admittedly interstate gas) through 227.6 miles of 30" pipeline which *Supply* proposes to construct and operate (Docket CP60-101) from Three Rivers to El Paso's Sonora Plant in Sutton County, Texas (Tr. p. 271; Exs. 5-A, 6, 7, 8, 9, 10; Item D). Under arrangements to be made with El Paso (Tr. p. 269), Supply will use some of this gas (about 1,460 Mcf per day—at 14.73= pb.) to operate its said Coquat Station at Three Rivers and its said transmission line from there to Sonora (Tr. p. 268; Ex. 7; Item D, Sch. 1).

(d) *El Paso*—Assuming Commission authorization therefor (Docket CP61-26), and the completion of Lo-Vaca's and Supply's proposed facilities and of its own new fuel lines and other necessary facilities (Tr. p. 135), El Paso proposes to route the commingled stream of Lo-Vaca and Houston gas (supplemented by additions to that stream at certain other points on its system, Tr. pp. 271, 282; 289-90, 307-8; Item B) to its fuel-consuming compressor stations located downstream of Sonora (Tr. p. 157, Ex. 7, 8), and at said stations to extract from the said commingled stream in the aggregate quantities of gas for such use equal to or greater than those it has agreed with Houston to extract and use in Texas and with Lo-Vaca to extract and use beyond Texas.[9] Flow diagrams and maps for such plant fuel use on an average demand day and a maximum demand day and the detailed oral testimony of El Paso's chief pipeline engineer fully illustrate El Paso's proposed fuel line construction and the quantities of fuel gas thereafter to be metered and withdrawn physically at these stations downstream of Sonora from the commingled stream containing the Lo-Vaca and Houston gas in accordance with its agreement to use such gas as fuel. (Lo-Vaca's outside of Texas and Houston's entirely in Texas.) (Exs. 5-A, 7, 8, 9, 10; and see also Map Ex. 6 and Tr. pp. 285-88; Items B and D.)

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[9]By contract, Lo-Vaca's gas is to be transported and used by El Paso outside of Texas. El Paso concedes that some of Houston's gas likewise physically will pass outside of Texas, stating (Reply Brief, p. 2), "there is no dispute that 'following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed [as fuel] or remained in the commingled stream (R. 344).'" (Cf. also Tr. p. 282 and Ex. 10.)

F. DISCUSSION

1. The Statutes

Three sections of the Act warrant discussion. Section 7(c) provides, in pertinent part:

> No * * * person which will be a natural-gas company upon completion of any proposed construction * * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction * * * of any facilities therefor, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *

Section 2(6) defines a "natural-gas company" to mean "a person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale."

Section 2(7) defines "interstate commerce" to mean "commerce between any point in a State and any point outside thereof * * *."

Most important is the scope of the Commission's jurisdiction under the Act.

Section 1(b) provides in pertinent part:

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural-gas for resale for ultimate public consumption for domestic * * * or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas * * *.

Lo-Vaca concedes that it will be a natural-gas company when it engages in the sales and deliveries of gas proposed to be made to El Paso under the unrestricted May 16, 1960, contract, and it seeks authorization therefor (Docket CI60-693). It intends also to make the sales and deliveries proposed to be made under the March 15, 1960, restricted-use contract whether or not such sales are held to be likewise subject to its jurisdiction (Tr. pp. 9, 23-24), reserving its right to contest any determination of jurisdiction over the sales of the restricted use gas.

Houston, on the other hand, seeks no authorization for its proposed construction and restricted-use sales and deliveries to El Paso, and does not intend to carry out its contract if its proposed sales and deliveries are found to be subject to the jurisdiction of the Commission. (Tr. p. 16 and Ex. 2, p. 6.)

Section 1(b) and the applicable cases interpreting said section are thus determinative of the question the Commission's jurisdiction over Lo-Vaca's and Houston's proposed sales and deliveries under the restricted-use contracts, or either of them. In this connection, Lo-Vaca contends that its restricted-use contract is for a direct sale (not a sale for resale); Houston contends that its restricted-use sale not only is likewise a direct sale but also that it is purely an intrastate sale. Both claim exemption for these contracts under various court and commission cases which have construed Section 1(b),—primarily relying upon *State of North Dakota v. F.P.C.*, 247 F. 2d 173.

The staff contends that Houston's sale and delivery as well as those of Lo-Vaca will be in interstate commerce and for resale.

California contends that since "all the gas [Houston's and Lo-Vaca's] will be transported in a commingled stream with other Texas-produced gas which is admittedly jurisdictional * * * any restriction is a contractual one, not physical. (R. 200-1);" also that El Paso's proposal for carrying out its contractual obligation "is *incapable* of meeting the stated objective of the contracts of use solely as fuel and within or without Texas."[10]

The California Distributors (other than Pacific) like the Staff and California consider the restricted use contracts as "a subterfuge to escape regulation" (Brief, pp. 7-8 "because as a matter of physical fact, the gas [Houston's as well as Lo-Vaca's] must and does flow out of the State of Texas as part of the commingled stream and, in fact, a portion thereof does flow to California to be used for purposes of resale." To a considerable extent these Intervenors and the Staff rely on *Oklahoma Natural Gas Co.*, 23 FPC 291 and 531.

II. The Applicable Decisions

A large number of decisions by the Courts and the Commission are cited in the briefs of the parties, the same cases generally being cited by the opposing parties, but with differing interpretations of their holdings and or the applicability thereof to the issues herein.

[10]Aside from the effects of "the fact of commingling," California urges, irrelevantly to the limited issues herein, that "since the volume purchased was based on a maximum day, and the facilities cannot use the whole of this volume on an *average* day, it follows that some of the 'restricted' gas *cannot physically* be used *'solely as fuel'* nor within the appropriate geographical area," particularly on *minimum* days. That issue, like those of price and public convenience and necessity, were postponed for later determination in the certificate proceedings. (Tr. pp. 200-07).

Controlling Decisions as to Houston Contract.—A very recent decision by the Commission appears to be dispositive of the question of jurisdiction insofar as it relates to Houston.

This most recent decision of the Commission is its Order Modifying and Adopting the Initial Decision of Presiding Examiner, issued June 30, 1961, in *Shell Oil Company, et al.*, Dockets No. G-5029, *et al.* (25 FPC 1316).[11]

> * * * we are unable to find any basis for concluding that we have jurisdiction over Shell's sale of gas to Columbian for the latter's Seminole carbon black plant * * *. Although neither the *North Dakota* nor the *Oklahoma Natural* cases, nor any of the cases cited by the parties are precisely in point, in its crucial facts the present case more closely resembles the circumstances of the first named than any of the others. Under Section 1(b) of the Act, we have jurisdiction over "the sale in interstate commerce of natural gas for resale," and "the transportation of natural gas in interstate commerce." Here we have a sale of gas produced wholly in Texas, transported wholly in Texas and consumed wholly in Texas. This local gas is not commingled with any gas from outside the state, and all of it is separated from the commingled stream before any of the stream leaves the state * * *. These facts which differentiate this case from the *Oklahoma Natural* case, pro-

[11]This decision was issued too recently to be mentioned in the briefs herein. The Presiding Examiner's Decision which was therein modified by the Commission was discussed in several briefs.

vide no basis for a finding that this is a sale in interstate commerce.

The Commission's Order further states (25 FPC 1316, at 1322):

> * * * And although the gas for the Seminole plant is commingled with gas for El Paso destined for interstate commerce * * * the respective volumes of interstate and intrastate gas are metered and known, and all the intrastate gas is separated from the commingled stream before any of the gas leaves Texas. Thus there is likewise lacking any basis for finding that the movement of the Seminole gas to its destination is transportation in interstate commerce.

The proposed sale by Houston, therefore, appears to be clearly an intrastate sale under the *Shell case*—and the *North Dakota* case the "crucial facts" of which *Shell* closely resembles. Houston's proposed sale is not a sale for resale in interstate commerce.[12]

As in *Shell*, the Houston gas is to be "produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas."

Also, as in Shell, "[t]his local gas is not [to be] commingled with any gas from outside the state, and all of it is [to be] separated from the commingled stream [containing also Lo-Vaca gas destined to leave Texas] before any of the stream leaves the State." (Docket G-5029, *et al.*)

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[12]Except for the gas to be resold to fulfill fuel requirements of Supply in Texas and those of Phillips' gasoline plant in Ector County, Texas, it is not a sale for resale in *intrastate commerce*. (Tr. pp. 141, 269.)

Likewise, under the *Shell* and *North Dakota* cases, the proposed movement of Houston's gas appears to be clearly intrastate, since the volumes of Houston gas "are [to be] separated from commingled stream before any of the gas leaves Texas." (*id.* p. 1322.)

Controlling Decision as to Lo-Vaca Contract—Lo-Vaca's restricted-use gas, on the other hand, is to be transported outside of Texas for use as compressor station fuel beyond the borders of that state. The proposed movement will be "transportation of natural gas in interstate commerce," and, therefore, subject to the Commission's jurisdiction.

Despite Lo-Vaca's contentions that its proposed restricted-use contract is not a sale for resale, it appears that such contract itself also may be subject to jurisdiction, as a "sale in interstate commerce of natural gas for resale," under authority of *Oklahoma Natural Gas Company, et al.*, 23 F.P.C. 291, and Order Denying Rehearing, 23 F.P.C. 531—a case in which the "crucial facts" are similar.

Since the *Oklahoma Natural* case is so closely in point as to appear to be dispositive of the question of our jurisdiction over Lo-Vaca, liberal quotation therefrom is herein made.

In the original decision, the Commission stated:

> * * * Consolidated in transporting gas from Texas for sale in Oklahoma and Kansas is a "natural-gas" company * * * Oklahoma Natural's gas is, of course, commingled with Consolidated's gas in the pipeline. While Consolidated, * * * proposed to sell and deliver for consumption in Oklahoma an amount of this commingled

> gas that is at all times in excess of the amount of gas delivered by Oklahoma Natural, it is inevitable that some of Oklahoma Natural's gas commingled with Consolidated's gas will be physically transported out of Oklahoma for consumption outside the state * * *. (23 F.P.C. 291, 292-93.)

Concerning the contractual provisions the Commission said:

> The exchange agreement provides: "Consolidated further agrees that all of the volumes of gas delivered by Oklahoma Natural to Consolidated hereunder will be used and consumed only within the State of Oklahoma and that such volume of gas will, under no circumstances, be transported by Consolidated in interstate commerce or resold for transportation and or resale in interstate commerce. It is understood, however, that * * * before any portion of the gas stream has left the State of Oklahoma it will be metered and determined that the volumes of gas metered and sold by Consolidated in its Northern Oklahoma system are at all times more than the volumes of gas being delivered to it by Oklahoma Natural." (23 F.P.C. 291, 293.)

The Commission's conclusions were:

> In our opinion the provision in the exchange agreement does not prevent Oklahoma Natural from being a natural-gas company within the meaning of the Act. Section 2(c) of the Act defines a "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such

gas for resale." "Interstate commerce" is defined in part to mean "commerce between any point in a State and any point outside thereof." Interstate commerce has taken place here because Oklahoma Natural has delivered gas which is transported outside the state and consumed outside it. *Interstate Gas Co. v. F.P.C.*, 331 U.S. 682, 687-689. This gas has entered the stream of interstate commerce, and has passed across the state border. As was said in *Deep South Oil Co. v. F.P.C.*, 247 F. 2d 882, 888 (CA5) "The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently there can be no question that petitioner is making sales for resale within the meaning of the Act." The fact that the contracting parties agree that Consolidated will deliver to its Oklahoma customers a greater amount of gas does not affect the interstate character of the transactions. The fact that Consolidated has not increased its deliveries to its Oklahoma customers, shows that by means of a contractual provision Consolidated is attempting to substitute Oklahoma Natural's gas for its interstate gas from Texas in making its Oklahoma deliveries. We do not think that the later contract can so effect the previous course of business. (23 FPC 291 293.)

Subsequently, in its Order Denying Rehearing, the Commission reaffirmed the previous decision, stating:

> * * * By contract with Oklahoma Natural, it would at all times deliver more gas to these customers than it would receive from Oklahoma Natural, but * * * admittedly Oklahoma Nat-

ural's gas became commingled with interstate gas in Consolidated's pipeline and was thus undeniably transported, in part, out of Oklahoma.

What we have here, is a sale of Oklahoma produced gas for resale to an interstate pipeline which would then deliver this gas, commingled with gas from out-of-state sources, to customers in both Oklahoma and Kansas. Sales to such an interstate system would be, in our opinion, part of the interstate course of business and would be clearly in interstate commerce * * *" (23 FPC 531 532.)

Characterizing the contract's attempt to avoid jurisdiction as a device, the Commission's order stated:

The contractual device of providing that Oklahoma Natural's gas shall be used in Oklahoma would not affect the interstate nature of the transaction that the parties propose. It is a mere statement that does not alter the course of operations other than to require that Consolidated continue to make deliveries in Oklahoma. If the contract were able to have the effect claimed, every producer or other seller of gas within a given state which sells gas to an interstate pipeline could escape jurisdiction if the pipeline happened to sell an equal or greater quantity of gas within the same state, and the seller had the right kind of contract with the pipeline. A problem would then be posed as to which sellers of gas had the privilege of being considered non-jurisdictional and which ones must be considered to be making the interstate sales. (23 FPC 531, 533.)

Both in its original *Oklahoma Natural* decision and in its Order Denying Rehearing, the Commission carefully distinguished the *North Dakota* case, saying in the former:[13]

> In our opinion, *State of North Dakota v. F.P.C.* * * * is distinguishable from the present case. In that case Montana-Dakota Utilities Company entered into contracts at approximately the same time for the purchase of "dump" gas at the price of 9 cents per Mcf at a processing plant belonging to other parties at Tioga, North Dakota, and for the purchase of "firm" gas at the same point for 16 cents per Mcf. All of the gas was to be produced in North Dakota * * * part of the 16 cent gas, * * * was to be transported by the Tioga-Williston line and was allegedly to be delivered by four proposed laterals to four towns in North Dakota where it would be consumed * * * We held with the examiner that the sale of the firm 16 cent gas to Montana-Dakota was entirely intrastate and were affirmed by the Court * * * (23 FPC 291, 294.)

[13]Chairman Kuykendall in his concurring opinion expressed the distinction thus: "In *State of North Dakota v. FPC*, 247 F. 2d 173, the gas over which we did not have jurisdiction was produced, transported, sold and consumed within the same state. *It was commingled and transported with gas which also had been produced within the state but eventually was transported out of the state and thus into interstate commerce. In other words the gas transported intrastate was never transported or commingled with any gas which had entered and was in interstate commerce.* Here the gas in question would enter, be commingled with, and transported with a stream of gas which already had been and still would be moving in interstate commerce. That is the *salient distinction* between the two situations." [Emphasis supplied.] (23 FPC 291, 296.)

In the original decision, the contrast was stated thus:

> In the present case the parties have attempted to keep Oklahoma Natural's gas separated from Consolidated's interstate stream, with which it is physically mixed, and to arrange by a contractual provision that all of Oklahoma Natural's gas be delivered in Oklahoma * * * Consolidated had already been delivering its own gas received from Texas to its Oklahoma customers. Its sales to these customers were, of course, sales in interstate commerce within the meaning of the Gas Act. The later introduction of Oklahoma Natural's gas into Consolidated's pipeline does not even from a conceptual viewpoint cause Oklahoma Natural's gas to be delivered to these customers alone. The situation therefore is different from that in the Montana-Dakota case where separate contracts with separate prices and for separate kinds of service were executed at approximately the same time, so that it could be said that in spite of physical commingling the firm gas was indentifiable and determinable and therefore intrastate * * * It would be a mere subterfuge to determine that the gas Oklahoma Natural would deliver to Consolidated in lieu of interstate gas, would be in intrastate commerce and non-jurisdictional.
>
> There is here more than a mere technical objection to the exemption requested * * * Because the amount of gas flowing in the interstate stream is altered by Oklahoma Natural's deliveries consumers beyond the state boundary are affected. This is the sort of thing that represents "commerce which concerns more States than one." It

was intended by the Gas Act that we regulate such interstate commerce, and we have no choice but to deny the request for an exemption. (23 FPC 291, 294-5.)

And in the Order Denying Rehearing saying:[14]

In *North Dakota v. F.P.C.*, * * * separation was achieved under different circumstances. Certain producers sold gas produced in North Dakota to Montana-Dakota Utilities at the tail-gate of a gasoline plant in North Dakota * * * all of the gas received at the gasoline plant which is delivered in North Dakota, was purchased in North Dakota * * * in the present case * * * Consolidated's pipeline carries both Oklahoma and Texas produced gas and its deliveries to its customers in Oklahoma include gas produced in Texas. In the *North Dakota* case there was a direct association between the sale of the 16 cent gas to Montana-Dakota and its delivery in North Dakota. In the present case, Consolidated's sales had no prior association with Oklahoma Natural's gas, for there was an interstate system already operating and delivering gas in Oklahoma and Kansas. Injecting Oklahoma produced gas into that system even with a contract that an equal amount of gas would always be delivered in Oklahoma does not alter the interstate nature of Consolidated's operations and Oklahoma Natural's sale. (23 FPC 531, 533-34.)

[14]The Commission also distinguishes on pages 533-34, *U.S. v. P.U.C.*, 345 U.S. 296; *Penna. Water & Power Co. v. F.P.C.*, 343 U.S. 414, 419; *Peoples Natural Gas Co. v. P.S.C.*, 270 U.S. 550; and *Hope Producing Co. et al.*, Docket No. G-15537, Feb. 3, 1959.

In its Order Denying Rehearing, the Commission, therefore, concluded as follows:

> In view of the above considerations and our previous order, Oklahoma Natural's sale to Consolidated is a sale for resale in interstate commerce. It appears Oklahoma Natural is a pipeline company as well as a producer, and there is no controversy on this point. Therefore Oklahoma Natural is a "natural-gas" company as a pipeline company, and we have no option but to assert jurisdiction, but in any case, Oklahoma Natural is engaged in activities that are a part of an interstate business and alter the interstate flow of gas, so that it is in accord with the policy of the Natural Gas Act that such a company be subject to regulation as a pipeline company. (23 FPC 531, 535.)

Substituting Lo-Vaca and El Paso for Oklahoma Natural and Consolidated, the pertinent portions of the above-quoted portions of that decision may be read to support similar conclusions as to the Lo-Vaca sale and El Paso's operations. As in *Oklahoma Natural*, the conclusion is clearly warranted that:

> Interstate commerce has taken place here, because [Lo-Vaca] * * * has delivered gas which is transported outside the state and consumed outside it. (23 FPC 291, 293.)

As in *Oklahoma Natural* also:

> This gas has entered the stream of interstate commerce, and has passed across the state border * * * [and] at least some portion of the gas * * * is resold to consumers outside the state of Texas * * * [where] by means of a contractual provision * * * [El Paso] is attempt

ing to substitute * * * [Lo-Vaca's] gas for its interstate gas from Texas [and New Mexico] in making [a similar quanity available for increasing] its * * * [California] deliveries. (23 FPC 291, 293).

Likewise as in *Oklahoma Natural:*

Injecting [Lo-Vaca's Texas] produced gas into * * * [El Paso's] system even with a contract than an equal amount of gas would always be * * * [used for compressor station fuel outside Texas] does not alter the interstate nature of * * * [El Paso's] operations and [Lo-Vaca's] * * * sale. (23 FPC 531, 534.)

Thus, as in *Oklahoma Natural,* it is concluded that:

* * * our jurisdiction * * * [is based] on * * * [Lo-Vaca's transportation and sale] being in interstate commerce as a part of the transaction essentially interstate with interstate consequences. (23 FPC 531, 534.)

And, finally as in *Oklahoma Natural:*

* * * [Lo-Vaca's] sale to * * * [El Paso] is a sale for resale in interstate commerce. * * * [Lo-Vaca] is a pipeline company as well as producer. * * * Therefore * * * [Lo-Vaca] is a "natural-gas" company as a pipeline company. * * * but in any case * * * [Lo-Vaca] is engaged in activities that are a part of an interstate business and alter the flow of gas, so that it is in accord with the policy of the Natural Gas Act that such a company be subject to regulation as a pipeline company. (23 FPC 531, 535.)

As pointed out, *supra*, in footnote 14, the *Oklahoma Natural* decision distinguished a number of the other cases cited and relied upon by Lo-Vaca and El Paso, and it should be noted that the subsequent *Shell* case not only reaffirmed and to some extent expanded the separability doctrine of the *North Dakota* case, but also reaffirmed and distinguished the *Oklahoma Natural* case, as follows:

> Nor are we able to find in any other facts concerning the Shell sale and the Columbian-El Paso exchange, or in the contractual provisions governing these transactions, any factors sufficient to convert what is nominally an intrastate sale of gas for the Seminole plant into an interstate sale * * * the sale of gas for the Seminole plant, although made under the May 20, 1948 contract governing the Shell sale, has no such immediate or substantial relationship to the Shell sale or to the Columbian-El Paso exchange as to justify finding it "part of the interstate course of business," in the language of the *Oklahoma Natural* case. Likewise, we are unable to determine that the interrelated transactions involved herein constitute a "contractual device," in the language of the *Oklahoma Natural* case, that might defeat Commission jurisdiction. Neither can we discern in the provisions of the contracts involved herein, or in the purpose or effect thereof, any justification for finding the sale of gas for the Seminole plant a sale in interstate commerce for resale subject to Commission jurisdiction.

Thus without undertaking to discuss herein the many cases pro and con cited and relied upon by the parties —all of which have been read and considered—it is concluded that the *North Dakota* case, as expanded by interpretation in the *Shell* case, is controlling as to the intrastate nature of Houston's contract, and Houston thereby is not subject to jurisdiction; and that, the *Oklahoma Natural* case, as distinguished from the *North Dakota* case both therein and in the *Shell* case, is controlling as to Lo-Vaca's becoming a participant in an "interstate course of business," and, despite a "contractual device," thereby becoming subject to jurisdiction.

The instant situations are so parallel, both in their "crucial facts" and in their purposes and effects, to these controlling cases, respectively, that any separate discussion of other cases herein would constitute a work of supererogation.

G. FORMAL FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, including the pleadings and briefs, and, in addition to the findings hereinbefore stated, it is further found and concluded that:

(1) El Paso Natural Gas Company is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate commerce of natural gas for resale for ultimate public consumption, and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) The sale and delivery of natural gas by Lo-Vaca Gathering Company to El Paso Natural Gas Company

for fuel consumption outside of Texas, as hereinabove described, and as more fully described in the record and in the application, will result in Lo-Vaca being engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and Lo-Vaca thereby will become a pipeline company and a natural gas company within the meaning of the Natural Gas Act.

(3) The natural gas facilities proposed to be constructed and operated by El Paso, Supply, and Lo-Vaca, as hereinbefore described, are to be used in the transportation and sale of natural gas in interstate commerce, and hence subject to the jurisdiction of the Commission, and to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(4) The sale and delivery of natural gas by Houston Pipe Line Company, as hereinbefore described in the record and in Houston's Petition for Declaratory Order, will *not* result in Houston's being engaged in the transportation of natural gas in interstate commerce or in the sale in interstate commerce of such gas for resale, and Houston will *not* thereby become a natural gas company within the meaning of the Natural Gas Act.

(5) The natural gas facilities proposed to be constructed and operated by Houston, as hereinbefore described, are to be used only in the transportation and sale of natural gas in *intrastate* commerce, and hence *not* subject to the jurisdiction of the Commission under the Natural Gas Act.

H. THE ORDER

Wherefore, It Is Ordered, subject to review by the Commission pursuant to its Rules of Practice and Procedure, that:

(A) Lo-Vaca Gathering Company's application for authority to carry out, without obtaining an appropriate certificate of convenience and necessity therefor, its proposed restricted-use contract of March 15, 1960, for the sale and delivery of natural gas to El Paso Natural Gas Company, be and it hereby is denied.

(B) Houston Pipe Line Company's petition for a declaratory order be, and it hereby is, granted and it hereby is held, declared and ordered that Houston's proposed restricted-use contract for the sale and delivery of natural gas to El Paso Natural Gas Company, and its proposed construction and operation of natural gas facilities incidental to the said proposed sale and delivery, will not be subject to the Natural Gas Act.

Robert E. Freer,

Presiding Examiner.

APPENDIX B

Petition for Review of an Order of the Federal Power Commission (Texas Case).

In the United States Court of Appeals for the Fifth Circuit.

No. 19478

Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, Petitioner Versus Federal Power Commission, Respondent.

(September 24, 1963.)

Before Rives and Cameron, Circuit Judges, and Bootle, District Judge.

Cameron, Circuit Judge: The question here involves solely the extent of the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act.[1] The facts underlying the controversy presented by this petition for review of an order of the Federal Power Commission are not in dispute and are, briefly, as follows:

Lo-Vaca Gathering Company (Lo-Vaca) requested certificate authority with respect to two contracts involving the delivery of natural gas to El Paso Natural Gas Company (El Paso). The first request involved the "gathering and delivery" to El Paso of 50,000 Mcf

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[1]The section outlining jurisdiction is 15 U.S.C.A. § 717(b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, *to the sale in interstate commerce of natural gas for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [Emphasis added]

(meaning, thousand cubic feet) of natural gas per day, and the second involved the "gathering and sale" of 70,000 Mcf per day. Authority requested under the first contract is thus limited to the "gathering and delivery" rather than the sale of the gas. Petitioners contend that regulation of the *sale* is not within the Commission's jurisdiction under the Act because that volume of gas is not to be resold. The contract provides:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

Jurisdiction is not disputed as to the second Lo-Vaca contract.

Houston Pipe Line Company (Houston) proposes to sell to El Paso 70,000 Mcf of natural gas per day to be consumed wholly within the State of Texas. The contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas."

It is not necessary here to outline the complicated routing of the gas through El Paso's multiplex lines. It is enough to say that, in each instance, petitioners propose to meter into the system, in Texas, the specified volumes of gas; that this gas will be commingled with

gas already in the lines (which gas is admittedly "jurisdictional"); that other gas will later be put into the lines; and that, at the points described in the quoted clauses of the contract, an equal volume of gas will be withdrawn for "non jurisdictional" use. The Commission does not claim that the physical in-metering—out-metering will not be faithfully consummated just as the contracts provide; rather, it argues that as a matter of physical reality the gas withdrawn will not be "non jurisdictional" gas because it will not be the *identical* gas metered into the lines under the contracts.

More quickly to delineate the issue drawn here, it should be noted that the Commission admits, as it must, that if the volumes under consideration were in some manner physically segregated it would not and could not claim jurisdiction over the sales. The Houston sale would not be subject to the Commission's jurisdiction because it would not be a "sale in interstate commerce;" and the Lo-Vaca sale, though in interstate commerce, would not be "for resale." 15 U.S.C.A. §717 (b). See, *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 1947, 332 U.S. 507. The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is, but the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its "non jurisdictional" status.

We hold that it does not. Gas is gas, and borrowing the words of Judge Brown, in connection with a dif-

ferent petroleum problem. ". . . the principles of constitutional law and statutory construction are not equated with laws of physics, so that the inquiry is something more than the schoolboy's quest for molecular identification." *Deep South Oil Co. of Texas v. Federal Power Commission*, 1957, 5 Cir., 247 F.2d 882, 891 (dissenting opinion).

First, we may discuss what is *not* involved. No question of constitutional limitations under the Commerce Clause need be considered. The Commission's jurisdiction under § 717(b) is not so broad as the scope of the federal power under Art. 1, Sec. 8, Cl. 3 of the Constitution. Its jurisdiction over the sale of natural gas is limited:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. . . .
>
> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, *supra* at 516, 517.

And, as we have said, the sales would admittedly be "non jurisdictional" if the gas so sold were not mixed

and commingled with other gas which was to be resold in interstate commerce. So the question is more finely drawn: if the gas metered out for "non jurisdictional" use will not be made up of the identical molecules as the gas so metered in, does the Commission thereby gain jurisdiction of the sale? Petitioners rely principally on two cases from the courts of appeal[2] to support their theory of "fungibility" or "separation by contract." These cases, in turn, rely on the language of *United States v. Public Utilities of California*, 1953, 345 U. S. 295. The *Public Utilities of California* case is the starting point.

The Navy contracted with California Electric Power Company to purchase electrical energy in California for the Navy's use[3] in Nevada. Delivery of the power was made at a sub-station about twenty-five miles from the Nevada line. The Power Company argued that jurisdiction of the Commission attached only to that portion of the energy resold by the Navy. Assuming *arguendo* that the energy could be so divided for jurisdictional purposes, the Court said that such separability "would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable . . . . But there is no record evidence of separate rates, separate contracts or separate rate regulation by official bodies; in short, that the 'sales' themselves were separate . . . .", pp.

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[2]North Dakota v. Federal Power Commission, 1957, 8 Cir., 247 F.2d 173; City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F.2d 31, certiorari denied, 349 U.S. 420.

[3]The Navy consumed some of the power and resold another portion.

317-318. The petitioners here have carefully tailored their transactions to fit the above *caveat*.[4]

City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420 (1955) involved a situation strikingly similar to the Lo-Vaca proposal. The City entered into two contracts with a supplier for the purchase of gas. One contract involved gas to be resold by the City and the other involved gas to be used by the City in its power plant. The gas came from out-of-state sources and was thus a "sale in interstate commerce." The gas sold under both contracts was delivered to the City in a commingled stream and, in holding the not-for-resale sale "non jurisdictional", that court said:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocations of gas and effective separate measurement facilities." [P. 36]

The situation in *North Dakota v. Federal Power Commission*, 8 Cir., 1957, 247 F. 2d 173, was very much like that involved here under the Houston contract. There, Montana-Dakota Utilities Company entered into two contracts for the purchase of gas for sale in intrastate market and two contracts for the purchase of gas for the interstate market. Gas under all four contracts was delivered to Montana-Dakota in a commingled stream at one delivery point in North Dakota. Some of the gas was then resold in North Dakota and attributed to the intrastate purchase contracts. The

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[4]Pennsylvania Water and Power Co. v. Federal Power Commission, 1952, 343 U.S. 414 is inapplicable. That case did not involve separate transactions, etc.

question phrased by the court was: ". . . does natural gas produced, wholesaled, transported, and sold for immediate consumption solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce . . .?" [P. 170] The court concluded:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' [intrastate sales] contracts are easily identifiable and determinable."

We think the rationale and holdings of these cases are controlling here.[5]

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[5]In both North Dakota and Hastings, the Commissioner disavowed jurisdiction, taking a position directly contrary to that taken here. E.g., a passage from the Commission's brief in North Dakota (before this court by agreement):

"For those decisions make it plain that the indistinguishable commingling of jurisdictional and non jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale; with other gas (or electricity) not delivered in inter-state commerce or not for resale, it is necessary for the Commission to determine 'whether (or not) an essentially separate transaction (for the non-jurisdictional delivery) . . . . . is identifiable'. United States v. P.U.C. of California, 345 U.S. 295, 318. The decisions spell out the principles upon which the Commission here rightly concluded that transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate."

The Commission here seeks to distinguish Hastings and *North Dakota* by the fact that, in those cases, all the gas sold was supplied by the same seller, whereas here El Paso is supplied by many sellers other than Lo-Vaca and Houston. It argues that to allow El Paso to "pick and choose" the suppliers of the "non-jurisdictional" quantities needed would be to allow the purchasing pipeline to discriminate between its various suppliers. The question, however, is whether the gas is effectively segregated by the device of a contract, rather than some physical barrier; and, therefore, the question of discrimination is irrelevant, insofar as the initial sales jurisdiction is concerned, if regulation of the sales is not within the jurisdiction of the Commission. If the gas could, in some manner, be transported in a physically segregated manner, jurisdiction would not attach; under the rationale of *Hastings* and *North Dakota*, and the language of *United States v. Public Utilities*, contractually-segregated gas is not jurisdictional; it must follow that discrimination *vel non* is not a proper area of inquiry. We can see no difference in the controlling legal principles here, even though the facts are somewhat different, as they are in almost all cases.

Neither is the question whether the expenditures are reasonable and prudent, and thus includable in the pipeline's cost of service for rate computation purposes, before us here. Nor is there before us any question as to *transportation*, rather than *sale*, certificate authority.

The Commission's position ignores the nature of natural gas. Gas in a pipeline can be separated only "on paper" or conceptually, or, at least, this is the cheapest

and most practical way to do it.[6] Gas lines *transport* gas for others, and we doubt that the owners are ever delivered the identical molecules turned over to the carrier. As we have said, gas is gas. The concept of separate identity, by volume, is not new. This Court, in a "hot oil" case, recognized that contraband oil commingled with lawfully produced oil could not be separated, as a physical fact. We concluded that both "justice and practical convenience would be served by allowing a separation as is proposed [proportional separation] . . . Commingling and proportional separation is daily practiced in the business of grain elevators, pipe lines, and the like. We see no reason why the practice is not proper here." *Federal Tender Board No. 1 v. Haynes Oil Co.*, 1935, 80 F.2d 468, 469.[7]

We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional gas. Their plea should be made, however, to Congress and not us. The courts are not competent to make legislative decisions as to whether jurisdiction *should*

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[6]Must petitioners be driven to the unnecessary expense of constructing a parallel line to carry the "non-jurisdictional" gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation.

[7]*See also, Humble Oil and Refining Company v. Texas and Pacific Ry. Company*, 1955, Sup. Ct. Tex., 280 S.W. 2d 547, 552: "The fact that Humble was also shipping from New Mexico should not change the character of its shipments originating in Texas. Accordingly, we hold that the oil produced in and shipped from New Mexico to East Texas takes an interstate rate and the oil produced in West Texas and shipped to East Texas takes an intrastate rate, and this irrespective of its being commingled with other oil enroute."

be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them.

In closing, we must comment on the Commission's assertion that petitioners "beg the question" by stating that the sales are not "jurisdictional" because, as a matter of fact, most of the gas molecules put into the lines are sold in interstate commerce and will be resold. As we see it, this is not begging the question but is merely stating it. We hold that such gas is not "resold" in interstate commerce, because it is contractually segregated and is either consumed by the pipeline itself, or resold in Texas.

It is clear, moreover, that all of the gas is *not* sold for resale in interstate commerce. It must follow that, if those volumes of gas can be segregated, the Commission has no legitimate interest in the sale of that amount of gas. The method of segregation used here seems to be the most practical one. No one has suggested to us any reason why the mixing or commingling of this gas with other gas hampers the regulation of sale of the "jurisdictional" gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consummation of these plans. The sub-

stance of the proposals is that "non jurisdictional" gas will honestly be used for "non jurisdictional" purposes. Congress' refusal to give jurisdiction over such sales, assuming it has the constitutional power to do so, should not be thwarted because of the physical nature of natural gas.

The petition for review is granted; the petitioners' request that the Commission's order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption, be set aside is granted and the case is remanded for disposition not inconsistent with this opinion.

ORDER VACATED.

Rives, Circuit Judge, Dissenting:

As shown in 15 U.S.C.A. §717(b), quoted in footnote 1 to the majority opinion, the Commission has jurisdiction of (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural gas companies engaged in such transportation or sale." The questions for decision are whether the Commission has jurisdiction over proposed sales of natural gas by Lo-Vaca and by Houston to El Paso.

The controlling facts as found in the opinion of the Commission are as follows:

> "Lo-Vaca . . . at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial

price of 22¢ per Mcf. There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

> "'All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.'

Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso."

". . . . Since 1925, it [Houston] has engaged in the purchase, transportation and sale of natural gas within Texas, and, at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's

gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢ plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, 'El Paso represents and covenants' that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas.' El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

"The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and north-

ward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

"El Paso proposed . . . . to supply its main-line compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

"Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Hous-

ton by 6.091 M²cf per day and on a maximum day would exceed the supply by 31.879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

"The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21.373 M²cf per day on an average day and by 36.549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California."

Thus Houston's and Lo-Vaca's respective contracts with El Paso attempt to restrict the use of the gas to nonjurisdictional purposes, and provide, on the principle of "fungibility," that if their gas is not in fact used for the contractually stated nonjurisdictional purpose, an equal volume of gas supplied by some other supplier will be so used. The Commission refused to let its jurisdiction turn upon the provisions of contracts that do not correspond and are not intended to correspond to reality. I agree with the Commission.

Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas. This Court so held in *Deep South Oil Co. v. F.P.C.*, 5 Cir. 1957, 247 F.2d 882, and its companion case, *Shell Oil Co. v. F.P.C.*, 5 Cir. 1957, 247 F.2d 900. In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g.*, *Sprout v. South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR v. Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co. v. Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co. v. Power Comm'n*, 1945, 324 U.S. 515, 529: "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."

A detailed discussion of the facts of the cases relied on by the majority would unduly prolong this opinion. Carefully considered, I submit that none of those cases permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional seller into the particular "restricted" use. In no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality.

The Commission's jurisdiction over the proposed sales of natural gas by Lo-Vaca and by Houston to El Paso is much more clear than its jurisdiction sustained in *United Gas Pipe Line Company*, Opinion No. 401 of the Commission issued August 26, 1963.

I respectfully dissent.

APPENDIX C.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

United States Court of Appeals for the Fifth Circuit October Term, 1962

Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, Petitioners, versus Federal Power Commission, Respondent. No. 19,478

Before Rives and Cameron, Circuit Judges, and Bootle, District Judge.

JUDGMENT

This cause came on to be heard on the Petition of Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, for review of an order of the Federal Power Commission issued on October 23, 1961 in Docket Nos. CI60-693, Et Al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted; the petitioners' request that the Commission's Order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption be set aside is granted; and that this cause be, and it is hereby, remanded to the Commission for disposition not inconsistent with the opinion of this Court. Rives, Circuit Judge, dissents

September 24, 1963

Issued as Mandate: Nov. 5, 1963.

APPENDIX D.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

In the United States Court of Appeals for the Fifth Circuit

Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, Petitioners v. Federal Power Commission, Respondent Southern California Gas Company, Et Al., Intervenor-Respondents No. 19478

(December 17, 1963)

ON PETITION FOR REHEARING

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM

This cause coming on for hearing upon the petition for rehearing filed on behalf of the Respondent Federal Power Commission, together with motion for rehearing by the Court en banc, joined in by Southern California Gas Company et al. as Intervenor-Respondents, and the Court having considered the same and the briefs filed in support and in opposition thereto, it is ordered and decreed that the said petitions for rehearing and also the motion for rehearing en banc be, and they hereby are, DENIED.

Judge Rives: Dissent

Judge Bootle: Concur

APPENDIX E.

Chapter 15B.—Natural Gas.

§ 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such trans-

portation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

Affidavit of Service by Air Mail.

In the Supreme Court of the United States. October Term, 1963. No. .....

Southern California Gas Company, a corporation, and Southern Counties Gas Company of California, a corporations, Petitioners, vs. Lo-Vaca Gathering Company, a corporation, and Houston Pipe Line Company, a corporation, and El Paso Natural Gas Company, a corporation, Respondents.

State of California, County of Los Angeles, ss.

Viola Figg, being first duly sworn, deposes and says: That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for John Ormasa, William H. Owens, Milford Springer, and Robert M. Olson, Jr., who are the attorneys for the Petitioners in this action; that this affiant is of the firm of Parker & Son, Inc., 241 East Fourth Street, who are the printers and agents in this matter for said attorneys, and have their offices in the City of Los Angeles, State of California.

That on the 11th day of March, 1964, affiant served the within Petition for Writ of Certiorari on the Respondents in this action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Respondents at the business/residence addresses of said attorneys, as follows: George D. Horning, Jr., Esq., C. Frank Reifsnyder, Esq., Harry Albrecht, Esq., Hogan & Hartson, 800 Colorado Bldg., Washington, D. C., Attorneys for El Paso Natural Gas Co.; Howard E. Wahrenbrock Esq., Solicitor, 441 "G" St, N. W., Washington 25, D. C., Attorney for Federal Power

Commission; Hugh Q. Buck, Esq., Jefferson D. Giller, Esq., Richard L. McGraw, Esq., Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of Southwest Bldg., Houston 2, Texas, Attorneys for Houston Pipe Line Co.; Bradford Ross, Esq., Sherman S. Poland, Esq., Ross, Marsh & Forster, 725-15th St., N. W. Washington 5, D. C., Attorneys for Lo-Vaca Gathering Co., J. Calvin Simpson, Esq., Gerald A. Laster, Esq., John Murphy, Esq., 514 State Bldg., San Francisco 2, Calif. Attorneys for Public Utilities Commission, State of California; and Hon. Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., at the county seat of said county, by then sealing said envelopes and depositing the same, with air mail postage thereon fully prepaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG

Subscribed and sworn to before me this 11th day of March 1964

MARGARET H. FALES

Notary Public, in and for the County of Los Angeles, State of California

My Commission Expires January 11, 1966

[Seal]

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, AND EL PASO NATURAL GAS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 24, 1963.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit (App. A, *infra*, pp. 22–37) are reported at 323 F. 2d 190. The opinions and orders of the Federal Power Commission (R. 256–277, 332–334) are reported at 26 FPC 606 and 840.

JURISDICTION

The judgment of the court of appeals setting aside the Commission's order was entered on September 24, 1963 (App. B, *infra*, pp. 38–39). A timely petition for rehearing was denied on December 17, 1963 (App. C, *infra*, pp. 40–41). On March 10, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

When a producer sells natural gas to an interstate pipeline company, which commingles it with gas from other sources and uses some of the mixture for local sales or in the operation of the pipeline, but sells the bulk in interstate commerce, may the producer and pipeline defeat the jurisdiction of the Federal Power Commission over "sales in interstate commerce for resale" by stipulating, contrary to the physical fact, that the producer's gas will all be consumed within the State or by the pipeline itself?

STATUTE INVOLVED

Section 1(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717(b), provides as follows:

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies

engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

This case involves the jurisdictional status, under Section 1(b) of the Natural Gas Act, of two sales which Lo-Vaca Gathering Company and Houston Pipe Line Company propose to make to El Paso Natural Gas Company. El Paso, one of the country's largest interstate natural gas pipelines, obtains its gas supplies chiefly in the Panhandle and Permian Basin areas of western Texas and the San Juan Basin in northwestern New Mexico. Its main transmission lines extend in two parallel systems from western Texas, across New Mexico and Arizona, to the California border. While it has many customers along the route, the bulk of its deliveries are made at the Arizona-California border to three California distribution companies, including two of the intervenors below, Southern Counties Gas Company and Southern California Gas Company.[1]

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[1] This description is based upon the statement of facts in *People of the State of California* v. *Federal Power Commission*, 296 F. 2d 348 (C.A.D.C.), reversed, 369 U.S. 482. It describes the El Paso system prior to the merger with Pacific Northwest Pipeline Corporation. Commission authorization of that merger was set aside by this Court in the cited case and divestiture was ordered in *United States* v. *El Paso Natural Gas Co.*, No. 94, this Term.

The two companies named in the text and the State of California have already filed petitions for certiorari in the instant case, Nos. 914 and 915, this Term.

The Lo-Vaca Contracts.—In 1960, El Paso entered into two contracts with Lo-Vaca Gathering Company for the purchase of gas in the Texas Gulf area, to be delivered for El Paso's account to El Paso Gas Supply Company, a wholly owned subsidiary, at a point in the immediate vicinity of Three Rivers, in Live Oak County, Texas (R. 256–257).[2] Gas Supply was to construct a compressor station at Three Rivers (the Coquat Station) and a 227-mile pipeline from Three Rivers to one of the southernmost points of the present El Paso system, the Sonora plant in Sutton County, Texas (R. 256–257).[3] One of the El Paso-Lo-Vaca contracts, dated May 16, 1960, is admittedly a sale in interstate commerce for resale, and is not involved in this proceeding.[4] The other contract, dated March 15, 1960, provides for the delivery to El Paso of 50,000 Mcf of gas per day at an initial price of 22¢ per Mcf, with escalations during the twenty-year term up to 26¢ (R. 142,257). It contains the following provisions, which, in the view of the majority below, have the effect of precluding Commission jurisdiction (R. 149):

> All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's

[2] Lo-Vaca is not itself a producer of natural gas, but will purchase the gas it proposes to resell to El Paso from a number of producers (R. 122–123).

[3] A map of the El Paso System with these proposed additions appears at R. 335, the last page of the main volume of the Joint Appendix in the court below.

[4] The contract originally called for the delivery of an average of 50,000 Mcf of gas per day at Coquat. The amount was later increased to 80,000 Mcf per day (R. 257).

> compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

In Article X, Section 2, the contract adds (R. 142):

> It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale. * * * [5]

This "restricted use" agreement provides for the separate metering of the contract volumes prior to their delivery into El Paso's system at Three Rivers. El Paso has stated that it will meter the gas used for fuel purposes in its New Mexico and Arizona facilities to make certain that this amount will invariably exceed the volumes of gas simultaneously taken from La Vaca under the "restricted use" contract. (App. A, *infra*, p. 24, R. 260).[6]

The Houston sale.—By a contract dated July 19, 1960, Houston Pipe Line Company proposed to sell to El Paso, over a 20-year term, an average of 70,000

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[5] La Vaca has indicated, however, that it intends to sell gas under both contracts even if the Federal Power Commission has jurisdiction over the allegedly "restricted use" contract (R. 258).

[6] The metering of volumes of gas consumed in the compressor stations and other facilities of the pipeline is not peculiar to the present case; indeed it is required by the Commission's Uniform System of Accounts in order to determine what portion of gas purchase costs should be attributed to the transmission-expense accounts. F.P.C. Uniform System of Accounts for Natural Gas Companies (Class A and Class B) Account 854, 18 C.F.R. Part 201, Account 854.

Mcf of gas per day, which it would purchase from various producers. The price to El Paso is to be determined under a formula which, in effect, adds 6⅛¢ per Mcf to Houston's average gas purchase cost (R. 94–95). As in the case of Lo-Vaca, Houston's gas would be delivered to Gas Supply's pipeline at the Coquat Station. It, too, would be metered separately (R. 59). The Houston contract contains a "restricted use" provision by which Houston purports to limit its gas to use within Texas (R. 78):

> * * * it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that the gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. * * *

It provides further for the metering of the gas used at the various places in Texas and includes a covenant by El Paso that the Texas uses will at all times exceed the amount simultaneously taken from Houston (R. 78–79). Houston's president acknowledged that his company's gas would actually be used outside of Texas and that the restriction was purely contractual (R. 53, 55, 56–57).

Soon after the execution of the contract, Houston petitioned the Commission for a declaratory order

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[7] F.P.C. Rules of Practice and Procedure, § 1.7(c), 18 C.F.R. 1.7(c).

to the effect that the proposed sale would not be a sale in interstate commerce. Since most of its supply was purchased under contracts permitting the producers to cancel if their gas is to be resold by Houston in interstate commerce (R. 180–182), Houston alleged a need for immediate removal of any uncertainty as to the jurisdictional status of its proposed sale to El Paso.

The facts of gas flow.—The gas to be supplied by Lo-Vaca and Houston would be physically commingled after entry into Gas Supply's pipeline at the Coquat Station (R. 60). A small portion of this stream would be used as fuel in operating the Coquat compressor station, some would go the way of "line loss" in Gas Supply's pipeline from Coquat to Sonora, and some would be consumed at El Paso's Sonora dehydration plant (R. 61, 116, 117, 259). The rest would move, commingled with gas from the Sonora plant and other sources, through El Paso's mainline to Benedum Junction in Upton County, Texas, where the stream would divide (R. 61, 119, 259). At this stage, one portion would flow toward El Paso's Goldsmith Plant in Ector County, Texas, then northward to Plains, Texas (R. 259), and then westward through El Paso's northern pipeline through New Mexico and Arizona to the California border (*ibid.*). Gas from numerous sources would enter the stream between Benedum Junction and Plains; at Plains itself a stream from the Texas Panhandle would be added, and in New Mexico, San Juan Basin gas would enter the northern line (R. 62–65, 115, 259, 335).

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The other portion of the stream would flow from Benedum Junction through Crane County, Texas, to El Paso's Keystone compressor station in Texas (R. 259).[8] From there, the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas, again into New Mexico near the City of El Paso, and on to the border of California. In New Mexico gas is added from various sources in that State and in Texas (R. 259). El Paso, however, had a pending application to construct a line from the Keystone Station to west Texas, and the Commission assumed the existence of that facility for purposes of this case. The building of this line would make it possible for El Paso to supply its west Texas compressor stations with gas produced and transported entirely in Texas. But, even then, the particular source or seller of the gas so used could not be determined since that gas would come from the commingled stream leaving El Paso's Keystone Station (R. 259–260).[9]

While both the El Paso-Lo-Vaca and El Paso-Houston contracts specify restricted uses for the gas

[8] This is the center of El Paso's Permian Basin facilities and one of its most important areas of gas supply. The flow diagram of the Permian Basin portion of the El Paso system which appears at R. 119 gives a fair impression of the great number and complexity of gas flows into the lines on this one portion of El Paso's system.

[9] Since the time of the decision below, El Paso has withdrawn the application for these particular pipeline facilities because the Commission had denied a continuance of the hearing which El Paso had requested to up-date the application. This withdrawal does not preclude El Paso from filing a new application to build comparable facilities.

sold under those contracts, it is conceded by respondents' officials that the gas sold by Houston and Lo-Vaca will flow in a commingled stream with all the other gas and that at least a portion of the Houston and Lo-Vaca gas will in fact be used for resale in interstate commerce outside of Texas. See, *e.g.*, testimony of El Paso's chief pipeline engineer (R. 66).[10]

The decision below.—The Commission (one Commissioner dissenting as to the Houston sale) held that the sales of both Houston and Lo-Vaca would be sales for resale in interstate commerce and thus subject to its jurisdiction (R. 254–274). The court below (in an opinion by Judge Cameron, Judge Rives dissenting) set aside the Commission's determinations. Although it expressly recognized (App. A, *infra*, pp. 24–25) that most of the gas sold under the restricted use contracts would in fact be resold in interstate commerce, the court concluded that since gas is fungible, separation into different uses could be determined by contract. The majority observed (App. A, *infra*, p. 31) that while it "may well be that the State of Texas has no incentive to regulate the cost" of the gas sold to El Paso under the "restricted use" contracts, the existence of such a regulatory gap has "no rele-

[10] As a corollary to these admissions, it was conceded that the exhibits (R. 116, 117) introduced by respondents purporting to specify the particular facilities that would utilize Houston or Lo-Vaca gas were based entirely on the attribution to those uses made by the contracts with El Paso (R. 54–55, 360–361). Pages 336–364 of the Record comprised the "Supplemental Joint Appendix" below which was numbered separately from the main volume. Thus, R. 360–361 was pp. 23–24 of that Supp. J. App.

vance in interpreting the statute." Judge Rives, dissenting, stated that none of the cases relied upon by the majority "permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional seller into the particular 'restricted' use. In no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality" (Appendix A, *infra*, p. 37).

REASONS FOR GRANTING THE WRIT

This case presents an important question as to the scope of the Power Commission's jurisdiction over "the sale in interstate commerce of natural gas for resale." The court of appeals' disposition of this issue departs from the principles which this Court has consistently applied.

It is settled that where part of a stream of natural gas or electric energy sold under a single contract is interstate in character and is resold by the purchaser, the entire transaction falls within the Commission's jurisdiction, even though the remainder is consumed by the purchaser itself or within the producing State. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 419–420; *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 316–318; *Federal Power Commission* v. *Southern California Edison Co.*, No. 71, this Term. But for the

contract language, therefore, both these transactions would be subject to federal regulation. The question thus narrows: Is the jurisdictional status of a sale governed by what the purchaser actually does with the gas—*i.e.*, by the physical facts of gas flow—or is it controlled by the recitations of contract? The holding below—that the Commission's jurisdiction may be defeated by artificial contractual restrictions bearing no relationship to reality—is without basis in the statute, is contrary to the jurisdictional standards laid down by this Court, and creates a serious gap in the comprehensive regulatory scheme which Congress constructed for the protection of consumers.

1. (a) This Court has consistently based its jurisdictional decisions under the Natural Gas and Federal Power Acts upon a consideration of the physical facts. *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 467. The controlling principle, declared in *Connecticut Light & Power Co.* v. *Federal Power Commission.*, 324 U.S. 515, 529, and reiterated only this Term in *Federal Power Commission* v. *Southern California Edison Co.*, slip op., p. 4, fn. 5, is that federal jurisdiction is to be determined by:

> an engineering and scientific, rather than a legalistic or governmental, test.

Accordingly, gas which actually crosses a State border at any stage in its progress from well-head to ultimate consumption is "in interstate commerce" (cf.

Jersey Central Power & Light Co. v. *Federal Power Commission, supra*).[11]

The same emphasis upon concrete facts has characterized this Court's approach to the question whether a sale is "for resale" and accordingly subject to the Commission's rate regulation. In *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, a utility sold electric energy to the Navy Department, which used approximately 75% of it for its own consumption and resold the remainder to persons residing in a government housing project. This Court held that the entire transaction was subject to regulation by the Power Commission, stating (345 U.S. at 316):

> Certainly the *concrete fact of resale* of some portion of the electricity transmitted from a state to a point outside thereof invokes federal jurisdiction at the outset, despite the fact that the power thus used traveled along its interstate route "commingled" with the other power sold by the same seller and eventually directly consumed by the same purchaser-distributor * * * [emphasis added].

The Court dismissed as "insubstantial" the company's contention that the contracts were not "for resale" because they did not state as much. There is no reason why a contract such as Lo-Vaca's, which purports to preclude resale, albeit the parties know that an appreciable portion of the gas will in fact

[11] Section 2(7) of the Natural Gas Act defines "interstate commerce" as commerce between any point in a State and any point outside thereof.

be resold, can have any greater significance than a contract, such as the one in *Public Utilities Commission,* which simply ignored the fact of resale altogether.

To be sure, the Court left open the question whether federal jurisdiction would extend to "an essentially separate transaction covering the power directly consumed by the purchaser" (345 U.S. at 317–318). However, the Court's comments as to the possible relevance of a "separate transaction" must be read in light of the situation actually presented in the *Public Utilities Commission* case. There, the Navy received its entire supply of electric energy from a single source. Accordingly, a contract such as the Court envisaged—one which covered the measurable amount of energy directly consumed by the Navy—would also have covered the precise amount of "not-for-resale" energy actually supplied by that particular seller. It would neither have attributed to that seller energy which in fact was supplied by some other company, nor labeled as "non-jurisdictional" a portion of the seller's supply which in fact was used by the buyer for resale. In short, such a "separate transaction" would not have suffered from the twin vices of the Lo-Vaca contract. Nothing in *Public Utilities Commission* supports, and much negates, the view of the majority below that a contract may be used to "declare" jurisdictional facts at odds with reality, and thus to avoid federal jurisdiction over a major but indeterminate portion of the seller's gas which is in fact destined for resale. Moreover, in analogous "in-

terstate commerce" cases, this Court has repeatedly disregarded contracts which give fictitious constructions to business transactions solely for the purpose of achieving a particular jurisdictional result. *E.g.*, *Sprout* v. *South Bend*, 277 U.S. 163, 168; *B. & O. S.W. R.R. Co.* v. *Settle*, 260 U.S. 166, 170; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U.S. 265. See Powell, *Physics and Law*, 58 Harv. L. Rev. 1072, 1077–1078.[12]

The Houston and Lo-Vaca contracts do just that. Although the gas used to fuel El Paso's compressors comes from a variety of sources, El Paso has singled out these two suppliers for special treatment, arbitrarily designating 100% of their contract volumes as "non-jurisdictional". The "restricted-use" provisions in these two contracts could have no conceivable pur-

[12] In *Sprout*, this Court, speaking through Mr. Justice Brandeis, held that a motor bus line could not transform itself into an entirely interstate carrier simply by requiring each passenger to purchase a ticket to an out-of-state point and by holding itself out as an interstate carrier only.

In *Settle*, the Court dealt with an elaborate contractual scheme designed to make the final segment of an interstate transportation appear to be wholly intrastate by interrupting the transit and delivering the goods to a "consignee" for several days before reshipping them to their ultimate destination. Looking to the shipper's actual business purpose—to get his goods to the ultimate point—the Court concluded that the entire transportation from beginning to end constituted interstate commerce, to which an interstate rate was applicable. In contrast are such cases as *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257, where the activities carried on within the State by the shipper after receipt of goods from interstate commerce have genuine business utility so that the goods may be fairly regarded as having come to rest; then any subsequent transportation within the State is a separate intrastate matter.

pose or effect other than to avoid federal jurisdiction. Their removal from the Houston and Lo-Vaca contracts, and their insertion in the contracts of other suppliers, would not require the slightest change in El Paso's actual operations or in the routing of gas through its system.

(b) *City of Hastings, Nebraska* v. *Federal Power Commission,* 221 F. 2d 31 (C.A.D.C.), certiorari denied, 349 U.S. 920, and *North Dakota* v. *Federal Power Commission,* 247 F. 2d 173 (C.A. 8), the decisions chiefly relied upon by the court below, are inapposite. Those cases merely hold that when gas is received by a purchaser through a single conduit and used both for jurisdictional purposes (resale in interstate commerce) and non-jurisdictional purposes (direct consumption by the buyer or resale in intrastate commerce), the latter portion must be the subject of a separate contract or transaction in order to be exempt from the Commission's regulation. See *United States* v. *Public Utilities Commission, supra.* But while both cases recognize that "segregation by contract" is a necessary condition for exemption, neither holds that it would be a sufficient condition in a case, such as the present one, where the contract has no basis in reality.

In *Hastings,* the city received all its gas from an interstate pipeline at a number of city-gate delivery points, and used the supply partly for resale and partly as boiler fuel in its own electric generating plant; the volumes used at the plant were metered there after traveling through the city's system com-

mingled with the volumes used for resale. The pipeline's federally-regulated rate schedule contained a provision making the rates inapplicable to "gas used or consumed by Utility * * * for industrial purposes." Rejecting the city's contention that the pipeline's delivery at the city gate constituted a single sale subject in its entirety to FPC jurisdiction, both the Commission and the court of appeals concluded that the gas used at the power plant was attributable to a separate sale for direct consumption, which the Commission was forbidden to regulate under § 1(b).

The *North Dakota* case bears the same relationship to the Houston sale as *Hastings* bears to the Lo-Vaca transaction. At issue there was the jurisdictional status of a sale in North Dakota by two producers (Signal and Amerada) [13] to an interstate pipeline (Montana-Dakota) for resale in four small towns within the State. The gas was delivered to Montana-Dakota at an extraction plant which Signal operated at Tioga, North Dakota. From there the pipeline moved westward into Montana, serving the four North Dakota towns by means of laterals branching off the line, and transporting in a single stream the gas which was diverted to the towns and that which continued across the border for resale in

[13] Amerada owned 85 percent of the commingled stream delivered to Montana-Dakota and Signal, the remaining 15 percent. 16 F.P.C. 401, 403. Each executed separate sales contracts, but the Commission and the court of appeals treated them as one—perhaps because the volumes supplied by the two producers were delivered to the pipeline as a single stream of gas emanating from a single extraction plant.

Montana. Significantly, the Tioga plant was the pipeline's only source of supply in the State; no other gas entered the pipeline between Tioga and the Montana border. It was in these circumstances that the Eighth Circuit upheld the Commission's determination that the sale for resale in the four towns—a transaction covered by a separate contract—was not a sale "in interstate commerce."

The critical difference between *Hastings* and *North Dakota,* on the one hand, and the present case, on the other, is that in the former the purchaser obtained its entire supply from a single source. It was possible, therefore, to determine what proportion of the particular seller's gas was resold by the buyer in interstate commerce and what proportion the buyer consumed itself or resold within the State. In both of the earlier cases, the contractual separation corresponded to the separation of the seller's gas into these two measurable components. Every molecule supplied by the seller and actually resold by the buyer in interstate commerce remained subject to FPC regulation; and, conversely, every molecule which was used by the buyer for non-jurisdictional purposes, and thus exempted from federal regulation, was attributable with absolute certainty, and without resort to any fiction, to the particular supplier whose rates were at issue.[14] The cases, therefore, are entirely consistent

[14] It is true but immaterial that in *Hastings* and *North Dakota* the jurisdictional and non-jurisdictional volumes commingled for a time in the purchaser's system and were physically separated only when metered at the point of use. What distinguishes the Houston and Lo-Vaca contracts and renders

with the principle we urge here, *i.e.*, that the Commission's jurisdiction is governed by the actual facts of gas flow, rather than by contractual artifice.

2. The decision below would create a serious gap in the comprehensive regulation which Congress has established for protection of consumers. No State could be expected to regulate a sale by a producer to an interstate pipeline for ostensible use in the latter's own operations.[15] The producing State (here, Texas), though perhaps having the power, would have little interest in regulating an item of pipeline cost which would be reflected chiefly in the rates paid by consumers in other States. And the consuming States that might have an interest (here, New Mexico, Arizona, and California) would have no power to regulate sales of gas outside their own borders. By its decision, the court below thus creates a class of sales by independ-

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them wholly artificial is not the obvious impossibility of earmarking specific molecules as "non-jurisdictional" at the point they are delivered into El Paso's system, but the impossibility of attributing to any particular seller—*i.e.*, of identifying as "Houston's" or "Lo-Vaca's"—the volumes actually used for non-jurisdictional purposes even after those volumes are physically separated from the main stream. The Commission asserted jurisdiction here not, as the court below suggests (App. A, *infra*, pp. 25, 26), merely because the gas proposed to be supplied by Houston and Lo-Vaca would travel through the same pipeline with gas destined for resale in interstate commerce, but because a large but indeterminate part of the Houston and Lo-Vaca gas would itself be resold in interstate commerce, notwithstanding the "restricted use" provisions in the contracts.

[15] The minor part of the gas sold under the Houston contract which is designated for resale to Phillips for consumption as fuel for a gasoline extraction plant has not been the object of State regulatory concern.

ent producers which are free from any effective regulation, either State or federal.[16]

Under the Fifth Circuit's views, each interstate pipeline that uses a portion of the stream of gas to fuel its compressors and other auxiliary facilities (and that is almost every company) would be free to enter into as many non-jurisdictional contracts as it can fit within the volumetric limits of its use for these purposes.[17] The Commission's "Statistics of Natural Gas Companies—1962" (the latest year available) show that the 40 major natural gas pipeline companies consumed more than $85,000,000 worth of gas in operating their utility facilities, principally compressor stations. This represents almost 4% of the total gas purchase costs of those companies.[18] Thus, without in any way changing their actual operations, pipelines could create a substantial unregulated market for the benefit of particular producers merely by inserting into contracts of their choosing restrictive

[16] Presumably the decision would be equally applicable to jurisdictional questions under the Federal Power Act. Since electric energy is generated in the States of consumption to a much larger extent than gas, the opinion below, if left standing, would particularly invite the writing of purely fictional "restricted use" contracts by electric utilities in order to obtain the regulatory climate they believe most sympathetic to them.

[17] This would also mean, as noted by the Commission (R. 269–270), that any pipeline could favor such producers as it might choose by entering into this type of unregulated contract with them.

[18] In El Paso's case, the cost of gas used to operate its utility plant is more than 7½ percent of its total gas purchase costs. *Ibid.*

language similar to that employed in the Houston and Lo-Vaca contracts.[19]

As this Court noted in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28:

> Congress did not desire an "attractive gap" in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation. * * *

[19] In addition to its direct impact on a purchaser's cost, the establishment of a sizable unregulated intrastate market could readily generate pressures to increase the general price level at which gas will be available for jurisdictional purposes, and also cause the triggering of favored-nations and other contract price-changing clauses. See *Federal Power Commission* v. *H. L. Hunt*, No. 273, this Term, slip op., p. 10.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1964

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

(September 24, 1963)

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

CAMERON, Circuit Judge: The question here involves solely the extent of the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act.[1] The facts underlying the controversy pre-

[1] The section outlining jurisdiction is 15 U.S.C.A. § 717(b): "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, *to the sale in interstate commerce of natural gas for resale* for ultimate

sented by this petition for review of an order of the Federal Power Commission are not in dispute and are, briefly, as follows:

Lo-Vaca Gathering Company (Lo-Vaca) requested certificate authority with respect to two contracts involving the delivery of natural gas to El Paso Natural Gas Company (El Paso). The first request involved the "gathering and delivery" to El Paso of 50,000 Mcf (meaning, thousand cubic feet) of natural gas per day, and the second involved the "gathering and sale" of 70,000 Mcf per day. Authority requested under the first contract is thus limited to the "gathering and delivery" rather than the sale of the gas. Petitioners contend that regulation of the *sale* is not within the Commission's jurisdiction under the Act because that volume of gas is not to be resold. The contract provides:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

Jurisdiction is not disputed as to the second Lo-Vaca contract.

Houston Pipe Line Company (Houston) proposes to sell to El Paso 70,000 Mcf of natural gas per day to be consumed wholly within the State of Texas.

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public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [Emphasis added.]

The contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas."

It is not necessary here to outline the complicated routing of the gas through El Paso's multiplex lines. It is enough to say that, in each instance, petitioners propose to meter into the system, in Texas, the specified volumes of gas; that this gas will be commingled with gas already in the lines (which gas is admittedly "jurisdictional"); that other gas will later be put into the lines; and that, at the points described in the quoted clauses of the contract, an equal volume of gas will be withdrawn for "non jurisdictional" use. The Commission does not claim that the physical in-metering—out-metering will not be faithfully consummated just as the contracts provide; rather, it argues that as a matter of physical reality the gas withdrawn will not be "non jurisdictional" gas because it will not be the *identical* gas metered into the lines under the contracts.

More quickly to delineate the issue drawn here, it should be noted that the Commission admits, as it must, that if the volumes under consideration were in some manner physically segregated it would not and could not claim jurisdiction over the sales. The Houston sale would not be subject to the Commission's jurisdiction because it would not be a "sale in interstate commerce;" and the Lo-Vaca sale, though in interstate commerce, would not be "for resale." 15 U.S.C.A. § 717(b). See, *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 1947, 332 U.S. 507. The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In

short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is, but the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its "non jurisdictional" status.

We hold that it does not. Gas is gas, and borrowing the words of Judge Brown, in connection with a different petroleum problem, " * * * the principles of constitutional law and statutory construction are not equated with laws of physics, so that the inquiry is something more than the schoolboy's quest for molecular identification." *Deep South Oil Co. of Texas* v. *Federal Power Commission,* 1957, 5 Cir., 247 F. 2d 882, 891 (dissenting opinion).

First, we may discuss what is *not* involved. No question of constitutional limitations under the Commerce Clause need be considered. The Commission's jurisdiction under § 717(b) is not so broad as the scope of the federal power under Art. 1, Sec. 8, Cl. 3 of the Constitution. Its jurisdiction over the sale of natural gas is limited:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. * * *
>
> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at

which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana, supra* at 516, 517.

And, as we have said, the sales would admittedly be "non jurisdictional" if the gas so sold were not mixed and commingled with other gas which was to be resold in interstate commerce. So the question is more finely drawn: if the gas metered out for "non jurisdictional" use will not be made up of the identical molecules as the gas so metered in, does the Commission thereby gain jurisdiction of the sale? Petitioners rely principally on two cases from the courts of appeal[2] to support their theory of "fungibility" or "separation by contract." These cases, in turn, rely on the language of *United States* v. *Public Utilities of California,* 1953, 345 U.S. 295. The *Public Utilities of California* case is the starting point.

The Navy contracted with California Electric Power Company to purchase electrical energy in California for the Navy's use[3] in Nevada. Delivery of the power was made at a sub-station about twenty-five miles from the Nevada line. The Power Company argued that jurisdiction of the Commission attached only to that portion of the energy resold by the Navy. Assuming *arguendo* that the energy could be so divided for jurisdictional purposes, the Court said that such separability "would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable

[2] *North Dakota* v. *Federal Power Commission,* 1957, 8 Cir., 247 F. 2d 173; *City of Hastings* v. *Federal Power Commission,* 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420.

[3] The Navy consumed some of the power and resold another portion.

* * * But there is no record evidence of separate rates, separate contracts or separate rate regulation by official bodies; in short, that the 'sales' themselves were separate * * *", pp. 317–318. The petitioners here have carefully tailored their transactions to fit the above *caveat*.[4]

City of Hastings v. *Federal Power Commission*, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420 (1955) involved a situation strikingly similar to the Lo-Vaca proposal. The City entered into two contracts with a supplier for the purchase of gas. One contract involved gas to be resold by the City and the other involved gas to be used by the City in its power plant. The gas came from out-of-state sources and was thus a "sale in interstate commerce." The gas sold under both contracts was delivered to the City in a commingled stream and, in holding the not-for-resale sale "non jurisdictional", that court said:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocations of gas and effective separate measurement facilities." [P. 36]

The situation in *North Dakota* v. *Federal Power Commission*, 8 Cir., 1957, 247 F. 2d 173, was very much like that involved here under the Houston contract. There, Montana-Dakota Utilities Company entered into two contracts for the purchase of gas for sale in intrastate market and two contracts for the purchase of gas for the interstate market. Gas under all four contracts was delivered to Montana-

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[4] *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, 1952, 343 U.S. 414 is inapplicable. That case did not involve separate transactions, etc.

Dakota in a commingled stream at one delivery point in North Dakota. Some of the gas was then resold in North Dakota and attributed to the intrastate purchase contracts. The question phrased by the court was: "* * * does natural gas produced, wholesaled, transported, and sold for immediate consumption solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce * * *?" [P. 176]. The court concluded:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' [intrastate sales] contracts are easily identifiable and determinable."

We think the rationale and holdings of these cases are controlling here.[5]

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[5] In both *North Dakota* and *Hastings*, the Commission disavowed jurisdiction, taking a position directly contrary to that taken here. E.g., a passage from the Commission's brief in North Dakota (before this court by agreement):

"For those decisions make it plain that the indistinguishable commingling of jurisdictional and non jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale, with other gas (or electricity) not delivered in interstate commerce or not for resale, it is necessary for the

The Commission here seeks to distinguish *Hastings* and *North Dakota* by the fact that, in those cases, all the gas sold was supplied by the same seller, whereas here El Paso is supplied by many sellers other than Lo-Vaca and Houston. It argues that to allow El Paso to "pick and choose" the suppliers of the "non-jurisdictional" quantities needed would be to allow the purchasing pipeline to discriminate between its various suppliers. The question, however, is whether the gas is effectively segregated by the device of a contract, rather than some physical barrier; and, therefore, the question of discrimination is irrelevant, insofar as the initial sales jurisdiction is concerned, if regulation of the sales is not within the jurisdiction of the Commission. If the gas could, in some manner, be transported in a physically segregated manner, jurisdiction would not attach; under the rationale of *Hastings* and *North Dakota*, and the language of *United States* v. *Public Utilities*, contractually-segregated gas is not jurisdictional; it must follow that discrimination *vel non* is not a proper area of inquiry. We can see no difference in the controlling legal principles here, even though the facts are somewhat different, as they are in almost all cases.

Neither is the question whether the expenditures are reasonable and prudent, and thus includable in the pipeline's cost of service for rate computation purposes, before us here. Nor is there before us any

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Commission to determine 'whether (or not) an essentially separate transaction (for the non-jurisdictional delivery) * * * is identifiable'. *United States* v. *P.U.C. of California*, 345 U.S. 295, 318. The decisions spell out the principles upon which the Commission here rightly concluded that transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate."

question as to *transportation*, rather than *sale*, certificate authority.

The Commission's position ignores the nature of natural gas. Gas in a pipeline can be separated only "on paper" or conceptually, or, at least, this is the cheapest and most practical way to do it.[6] Gas lines *transport* gas for others, and we doubt that the owners are ever delivered the identical molecules turned over to the carrier. As we have said, gas is gas. The concept of separate identity, by volume, is not new. This Court, in a "hot oil" case, recognized that contraband oil commingled with lawfully produced oil could not be separated, as a physical fact. We concluded that both "justice and practical convenience would be served by allowing a separation as is proposed [proportional separation] * * * Commingling and proportional separation is daily practiced in the business of grain elevators, pipe lines, and the like. We see no reason why the practice is not proper here." *Federal Tender Board No. 1* v. *Haynes Oil Co.*, 1935, 80 F. 2d 468, 469.[7]

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[6] Must petitioners be driven to the unnecessary expense of constructing a parallel line to carry the "non-jurisdictional" gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation.

[7] *See also*, *Humble Oil and Refining Company* v. *Texas and Pacific Ry. Company*, 1955, Sup. Ct. Tex., 289 S.W. 2d 547, 552: "The fact that Humble was also shipping from New Mexico should not change the character of its shipments originating in Texas. Accordingly, we hold that the oil produced in and shipped from New Mexico to East Texas takes an interstate

We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional gas. Their plea should be made, however, to Congress and not us. The courts are not competent to make legislative decisions as to whether jurisdiction *should* be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them.

In closing, we must comment on the Commission's assertion that petitioners "beg the question" by stating that the sales are not "jurisdictional" because, as a matter of fact, most of the gas molecules put into the lines are sold in interstate commerce and will be resold. As we see it, this is not begging the question but is merely stating it. We hold that such gas is not "resold" in interstate commerce, because it is contractually segregated and is either consumed by the pipeline itself, or resold in Texas.

It is clear, moreover, that all of the gas is *not* sold for resale in interstate commerce. It must follow that, if those volumes of gas can be segregated, the Commission has no legitimate interest in the sale of that amount of gas. The method of segregation used here seems to be the most practical one. No one has suggested to us any reason why the mixing or com-

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rate and the oil produced in West Texas and shipped to East Texas takes an intrastate rate, and this irrespective of its being commingled with other oil enroute."

mingling of this gas with other gas hampers the regulation of sale of the "jurisdictional" gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consummation of these plans. The substance of the proposals is that "non jurisdictional" gas will honestly be used for "non jurisdictional" purposes. Congress' refusal to give jurisdiction over such sales, assuming it has the constitutional power to do so, should not be thwarted because of the physical nature of natural gas.

The petition for review is granted; the petitioners' request that the Commission's order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption, be set aside is granted and the case is remanded for disposition not inconsistent with this opinion.

Order vacated.

RIVES, Circuit Judge, Dissenting:

As shown in 15 U.S.C.A. § 717(b), quoted in footnote 1 to the majority opinion, the Commission has jurisdiction of (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural gas companies engaged in such transportation or sale." The questions for decision are where the Commission has jurisdiction over proposed sales of natural gas by Lo-Vaca and by Houston to El Paso.

The controlling facts as found in the opinion of the Commission are as follows:

> "Lo-Vaca * * * at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas

per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf. There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

" 'All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.'

"Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

"* * * Since 1925, it [Houston] has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be

determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢ plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, 'El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas.' El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

"The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Wink-

ler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

"El Paso proposed * * * to supply its main-line compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

"Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6,091 M²cf per day and on a maximum day would exceed the supply by 31,879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

"The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-

> Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21,373 M²cf per day on an average day and by 36,549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California."

Thus Houston's and Lo-Vaca's respective contracts with El Paso attempt to restrict the use of the gas to nonjurisdictional purposes, and provide, on the principle of "fungibility," that if their gas is not in fact used for the contractually stated nonjurisdictional purpose, an equal volume of gas supplied by some other supplier will be so used. The Commission refused to let its jurisdiction turn upon the provisions of contracts that do not correspond and are not intended to correspond to reality. I agree with the Commission.

Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas. This Court so held in *Deep South Oil Co.* v. *F.P.C.*, 5 Cir. 1957, 247 F. 2d 882, and its companion case, *Shell Oil Co.* v. *F.P.C.*, 5 Cir. 1957, 247 F 2d 900. In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g.*, *Sprout* v. *South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR* v. *Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co.* v. *Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co.* v. *Power Comm'n*, 1945, 324 U.S. 515, 529: "Federal jurisdiction was to follow the flow

of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."

A detailed discussion of the facts of the cases relied on by the majority would unduly prolong this opinion. Carefully considered, I submit that none of those cases permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional seller into the particular "restricted" use. In no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality.

The Commission's jurisdiction over the proposed sales of natural gas by La Vaca and by Houston to El Paso is much more clear than its jurisdiction sustained in *United Gas Pipe Line Company*, Opinion No. 401 of the Commission issued August 26, 1963.

I respectfully dissent.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

October Term, 1962

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

JUDGMENT

This cause came on to be heard on the Petition of Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, for review of an order of the Federal Power Commission issued on October 23, 1961 in Docket Nos. CI60-693, Et Al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is

hereby, granted; the petitioners' request that the Commission's Order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption be set aside is granted; and that this cause be, and it is hereby, remanded to the Commission for disposition not inconsistent with the opinion of this Court.

RIVES, Circuit Judge, dissents.

September 24, 1963.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

SOUTHERN CALIFORNIA GAS COMPANY, ET AL, INTERVENOR-RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

(December 17, 1963)

ON PETITION FOR REHEARING

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

Per Curiam

This cause coming on for hearing upon the petition for rehearing filed on behalf of the Respondent Federal Power Commission, together with motion for rehearing by the Court en banc, joined in by Southern California Gas Company et al as Intervenor-

Respondents, and the Court having considered the same and the briefs filed in support and in opposition thereto, it is ordered and decreed that the said petitions for rehearing and also the motion for rehearing en banc be, and they hereby are, DENIED.

"RIVES, Circuit Judge, Dissents."

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FILED
MAY 15 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

PEOPLE OF STATE OF CALIFORNIA, *et al.*, SOUTHERN CALIFORNIA GAS COMPANY *et al.*, FEDERAL POWER COMMISSION, *Petitioners*,

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, EL PASO NATURAL GAS COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 914, 915, and 990

PEOPLE OF STATE OF CALIFORNIA, *et al.*, SOUTHERN CALIFORNIA GAS COMPANY *et al.*, FEDERAL POWER COMMISSION, *Petitioners*,

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, EL PASO NATURAL GAS COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

Come now Lo-Vaca Gathering Company (Lo-Vaca), Houston Pipe Line Company (Houston), and El Paso Natural Gas Company (El Paso), respondents herein, and file this joint brief in opposition to the petitions

for writ of certiorari filed by the People of State of California (California), *et al.*, No. 914, Southern California Gas Company (S. Cal. Gas), *et al.*, No. 915, and the Federal Power Commission (Commission), No. 990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 323 F. 2d 190 (5th Cir. 1963). It is set forth in Appendix A to California's petition in No. 914. The order which denied petitions for rehearing and likewise denied the Commission's motion for rehearing *en banc* is contained in Appendix C to California's petition in No. 914. The opinion and orders of the Commission (R. 256-277, 332-334) are contained in Appendix A to the petition of S. Cal. Gas in No. 915.

JURISDICTION

The jurisdictional requisites are adequately set forth in the three petitions.

QUESTION

When a nonjurisdictional sale between two parties is separate from any jurisdictional sale between the same parties by reason of separate rates, separate negotiations, separate gas reserves, separate delivery points, separate metering, separate contracts, and separate regulatory control, is such sale converted into a jurisdictional sale when gas sold under such separate transaction is physically commingled by the purchaser with gas which is destined for resale subject to Commission jurisdiction?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U.S.C. §§ 717-717w) are set forth in Appendix D to California's petition in No. 914.

STATEMENT

Respondents designed their physical operations so that their transactions would be entirely separate from any sales over which the Commission has jurisdiction. They also designed their operations so that their sales would not constitute sales in interstate commerce for resale subject to commission jurisdiction (R. 140-162, 343, 486-489, 494). Petitioners' statements provide selected factual details relating to Respondents' sales. But Petitioners seek to leave the incorrect impression that Respondents rely solely upon language in their restricted-use contracts to show that their sales do not lose their nonjurisdictional status because of commingling with other gas separately sold in interstate commerce for resale.

The record shows, as the court below found (323 F. 2d 190, 192, California Pet. App. A, p. 5), that Petitioners have carefully tailored their physical operations, as reflected by the language of their contracts, so that their restricted-use volumes would remain separately identifiable at all times (R. 140-162, 343, 486-487, 494). To illustrate these essential facts it is necessary to set forth a short additional statement.

These proceedings involve two types of sales. La Vaca proposes to make a direct sale of natural gas for El Paso's own use in facilities in New Mexico and Arizona (R. 820-846). Houston proposes to make a sale of gas to El Paso to be consumed wholly in Texas

in intrastate commerce (R. 416-458). Contrary to contentions of Petitioners (Cal. Pet. 16; S. Cal. Gas Pet. 10-11; E.P.C. Pet. 15), both sellers and the purchaser propose many physical operations which will ensure that gas sold under their restricted-use contracts will, at all times, be separately identifiable by volume (R. 160-162, 358, 486-489). This is not a case where jurisdiction is sought to be made dependent upon contract language alone.

Recitation of material facts demonstrates that the language of the restricted-use contracts of Lo-Vaca and Houston are but reflections of proposed operations of sellers and buyer which, in fact and in law, maintain separate identity of the restricted-use volumes at all times. The provisions in Respondents' restricted-use contracts commit the parties to conduct their entire operations in a prescribed manner in order that the restricted-use volumes will remain separately identifiable at every stage. Significantly, under the Federal Power Commission's regulatory procedures, all gas sold by El Paso at the California border is attributable to volumes sold under nonrestricted-use contracts which are subject to regulation by the Federal Power Commission; gas consumed at points of restricted use is attributable to volumes sold under restricted-use contracts which is subject to regulation by the State of Texas (see *infra*, pp. 21-22).

We turn first to Lo-Vaca which entered into two separate contracts with El Paso (R. 820-846, 847-873). Its restricted-use contract here is for the sale of 50,000 Mcf per day for El Paso's own use (R. 823, 825-828, 842). Its unrestricted-use contract, which is not involved here, calls for a sale of 70,000 Mcf per day (R. 850-851). Negotiations on the restricted-use con-

tract began in February, 1960, and culminated in execution of the contract on March 15, 1960 (R. 25, 281). Lo-Vaca will not produce any of the gas to be delivered to El Paso in satisfaction of this contract,[1] but has contracted with producers whose reserves will be separately dedicated to satisfaction of the restricted-use contract (R. 25-26, 875). These reserves are entirely separate from reserves to be used in satisfaction of Lo-Vaca's unrestricted-use contract (R. 64-65, 216).

Lo-Vaca will construct the necessary gathering facilities to deliver the gas to El Paso at the Coquat Station near Three Rivers, Texas (R. 33, 815, 819). At that location, the separate identity of the restricted-use volumes will be further preserved by separate metering at separate delivery points (R. 35, 257). Lo-Vaca has filed an application for a certificate authorizing the transportation to the Coquat Station (R. 812-817).

Houston also proposes a sale to El Paso at the Coquat Station of 50,000 Mcf per day for restricted use in Texas, either in El Paso's own facilities or for sale to Phillips Petroleum Company at its Goldsmith Gasoline Plant in Sutton County, Texas (R. 416-458). The source of this gas is separate from any other gas purchased by El Paso with separate metering at a separate delivery point (R. 266), and the volumes will, at all times, be separately identifiable (R. 141, 486, 487).

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[1] Thus, Petitioner, California, is mistaken when it contends that Respondents' rates to El Paso would have an adverse effect on the Commission's area price policy relating to producer sales (Cal. Pet. 12). The restricted-use sales by Lo-Vaca and Houston would not be producer transactions which alone are subject to the Commission's area price determinations. The producer sales to Lo-Vaca *would be* subject to Commission regulation.

It is also pertinent that Houston engages in an entirely intrastate operation along the Texas Gulf Coast (R. 104-106, 415). Its customers include many industrial concerns and city-gate customers. Importantly, many of the producers upon whom Houston is, in turn, dependent for its supply have provisions in their gas sales contracts permitting them to terminate before their gas may be resold in interstate commerce (R. 109-111, 459).[2] Therefore, if Houston is to maintain adequate service to its existing customers, it must be assured that none of its sales will be in interstate commerce (R. 179). Necessity for this assurance is underscored by the fact that Houston's entire system reserves guarantee performance of the El Paso restricted-use contract (R. 169, 173, 179-180).

El Paso, through its subsidiary, El Paso Gas Supply Company, will physically receive and transport Lo-Vaca's restricted-use volumes commingled with Houston's restricted-use gas and with other gas to be purchased under Lo-Vaca's unrestricted contract (R. 268-269, 486-487). However, the record shows that El Paso will maintain separate identification of restricted-use volumes not only through metering at all points of restricted use (R. 343, 486-487), but also through construction of substantial facilities at many points to assure that restricted-use gas can, at all times, be delivered and utilized at the points of restricted use (R. 145-160, 485, 489). These new facilities will include both minor installations at various points on El

[2] Such fact belies Petitioner's assertion that there is no business reason for Houston to desire to make a nonjurisdictional sale (See S. Cal. Gas Pet. p. 20). In any event, there is no requirement in the Act, or elsewhere, which makes it necessary to advance a business reason for not engaging in transactions subject to federal jurisdiction.

Paso's system and the laying of a major segment of pipeline consisting of 114 miles of 16 inch line from the Keystone Station to the El Paso Station (R. 140-145, 494). El Paso will operate its system so that the restricted-use volumes purchased from Lo-Vaca will never exceed the restricted use in El Paso's facilities in New Mexico and Arizona (R. 343, 486-487). In a like manner it will also operate its facilities in Texas so that its restricted-use purchases from Houston will never exceed consumption at the points of restricted use (R. 160-162, 358, 486-489).

From the foregoing facts, it is obvious that a continual separate identification of restricted-use volumes is maintained, not by contractual language alone, but by means of physical operations so that the transactions themselves are continually separate. *United States* v. *P.U.C. of California*, 345 U.S. 295, 317-318 (1953).

SUMMARY OF ARGUMENT

The rationale of the "separability test" which is determinative of the jurisdictional issue here has been described by the Commission, itself, in its brief in *North Dakota* v. *F.P.C.*, 247 F. 2d 173 (8th Cir. 1957) where it echoed this Court's reasoning in *United States* v. *P.U.C. of California*, 345 U.S. 295, 317-318 [Brief of Respondent, Federal Power Commission, No. 15669, United States Court of Appeals, Eighth Circuit, January 1957, p. 10]:

> "* * * For those decisions [*United States* v. *P.U.C. of California*, 345 U.S. 295 and *City of Hastings* v. *F.P.C.*, 221 F. 2d 31 (D.C. Cir. 1954)] make plain that the indistinguishable commingling of jurisdictional and non-jurisdictional gas in delivery is not sufficient in itself to require that

> sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale, with other gas (or electricity) not delivered in interstate commerce, or not for resale, it is necessary for the Commission to determine 'whether [or not] an essentially separate transaction [for the nonjurisdictional delivery] . . . is identifiable' ".

Significantly, in *North Dakota*, the court applied the separability test in upholding commission denial of jurisdiction over restricted-use contracts (247 F. 2d 173, 177; see, *infra*, pp. 13-14).

The issue presented by Petitioners here is whether the decision below, which faithfully followed consistent court precedents in applying the separability test, should be overturned.

At the outset it is pertinent to note that the Commission has not only urged application of the established separability test in proceedings before this Court and lower courts,[3] but also has applied this test in numerous other cases which have come before it.[4]

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[3] See Brief of Respondent, Federal Power Commission, No. 11824, United States Court of Appeals for the District of Columbia Circuit, dated December 1953 and Brief of Federal Power Commission in Opposition, In the Supreme Court of the United States, No. 656, October Term, 1954 [both of the foregoing briefs relate to *City of Hastings* v. *F.P.C.*, 221 F. 2d 31 (D.C. Cir. 1954)]; Brief of Respondent, Federal Power Commission, No. 15669, United States Court of Appeals, Eighth Circuit, dated January 1957 [*North Dakota* v. *F.P.C.*, 247 F. 2d 173].

[4] See, *e.g.*, *Colorado Interstate Gas Co.*, 19 F.P.C. 1012 (1958); *Hope Producing Co.*, Docket No. G-15537, order issued February 3, 1959; *Shell Oil Co.*, 25 F.P.C. 1316, 1322 (1961); *City of Colton* v. *Southern California Edison Co.*, 26 F.P.C. 223 at 234-235, 237 (1961).

Notably, in a recent jurisdictional case involving the sale of electric energy the Commission expressly applied the separability test in holding a direct sale of energy for pumping purposes to be nonjurisdictional, despite commingling. *City of Colton* v. *Southern California Edison Co.*, 26 F.P.C. 223, 234-235 (1961)[5] (see, *infra*, pp. 27-28).

Furthermore, the Commission consistently applies the separability test in declaring that volumes transported by interstate pipelines for the account of ultimate consumers are not jurisdictional despite commingling with gas to be resold in interstate commerce (R. 1107). Indeed, it has issued certificates to major interstate pipelines whose economic feasibility has been dependent in large measure upon transportation of nonjurisdictional volumes commingled with resale volumes. See, *e.g.*, *Houston Texas Gas & Oil Corp., et al.*, 16 F.P.C. 118, 121-122 (1956); *Trans-Continental Gas Pipe Line Co., Inc.*, 7 F.P.C. 24, 29, 34 (1948) (see, *infra*, pp. 19-20).

This consistent court and commission interpretation repudiates Petitioners' contention that the lower court's decision constitutes a departure from established precedents or carves out an exception to Commission jurisdiction. On the contrary, the separability test applied by the lower court preserves the allocation of state and federal jurisdiction set forth in the Natural Gas Act (see, *infra*, pp. 16-19).

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[5] Affirmed, *sub nom.*, *F.P.C.* v. *Southern California Edison Co.*, No. 71, October Term, 1963, decided March 2, 1964, 84 S. Ct. 644. The Commission's denial of jurisdiction over the separate sale for pumping purposes, through application of the separability test, was not at issue on review.

Moreover, the separability test is both practical and realistic. It is practical, for as the lower court noted it avoids unnecessary expense of construction of separate facilities to transport the gas sold under non-jurisdictional transactions (323 F. 2d at 194). It is realistic, for the concept of separate identity by volume is not new but is practiced daily through commingling and proportional separation of fungible commodities in such businesses as grain elevators and pipe lines (*Ibid.*). See *Federal Tender Board No. 1* v. *Haynes Oil Corp.*, 80 F. 2d 468 (5th Cir. 1935).

We analyze below applicable cases which have consistently and correctly applied the separability test in factual situations indistinguishable in principle from the Lo-Vaca and Houston restricted-use sales (*infra*, pp. 10-16). We consider also Petitioners' contention that the lower court's decision would result in a gap in regulation (*infra*, pp. 16-23). Finally, we review briefly other jurisdictional cases, not involving the separability test, which are cited by Petitioners in their effort to expand Commission jurisdiction beyond the limited delegation of Section 1(b) of the Natural Gas Act (*infra*, pp. 24-28).

ARGUMENT

I

The Decision Below Is Clearly Correct

In holding that the restricted-use sales proposed by Lo-Vaca and Houston are not subject to federal jurisdiction, the court below followed an unbroken line of cases to reach the demonstrably correct result. *U.S.* v. *P.U.C. of California*, 345 U.S. 295 (1953); *City of Hastings* v. *F.P.C.*, 221 F. 2d 31 (D.C. Cir. 1954); and *North Dakota* v. *F.P.C.*, 247 F. 2d 173 (8th Cir. 1957). By attacking the lower court's decision Petitioners

would overturn the rationale of this Court in *California.*

Petitioners contend that Lo-Vaca's sale to El Paso for its own use in Arizona and New Mexico and Houston's sale to El Paso for consumption entirely in Texas are converted into sales for resale in interstate commerce because the restricted-use volumes would be commingled with gas destined for resale at the California border (Cal. Pet. 11, S. Cal. Gas Pet. 6-14, F.P.C. Pet. 10-11). Although they cannot deny that El Paso will always operate its system so that it will consume, at the restricted-use points, volumes equal to or greater than the restricted-use volumes to be purchased from Lo-Vaca and Houston (R. 145-162, 485), and that such system operation will faithfully maintain separate identification of restricted-use volumes (R. 141, 160-162, 343, 358, 486-489), they urge the Court to ignore these facts and hold that commingling alone converts these separate transactions into sales for resale in interstate commerce.

But, as the lower court recognized, the law is to the contrary. In *California*, this Court was presented with facts which showed that the energy sold to the Navy in California for its own use in Nevada was sold under the same contract as energy sold to the Navy for resale in interstate commerce: There was *one* delivery point, *one* sale, and *no* separate metering. This Court overturned attempted regulation of the sale by the State of California, holding that Federal Power Commission jurisdiction over the energy sold for resale necessarily extended to all energy sold under the *single* contract (345 U.S. at 317-318). In doing so, the Court expressly approved the separability test declaring that if there had been evidence of "separate rates, separate negoti-

ations, separate contracts, or separate rate regulation by official bodies, in short that the 'sales' themselves were separate", the opposite result would have been reached" (*ibid.*).

Likewise, *Hastings*, was properly relied upon by the lower court for it illustrates the applicability of the separability test to the facts of the Lo-Vaca sale. There, Kansas-Nebraska Natural Gas Company made a direct sale in interstate commerce to the City of Hastings for use in an electric generating plant. Under a separate contract, Kansas-Nebraska made a sale to the City for resale to ultimate consumers. All volumes were delivered at the city gate in a commingled stream. The City transported the volumes, still commingled, to the points of use.

Thus, contrary to the Commission's implication here (F.P.C. Pet. 17), it was simply not possible to determine whether the actual molecules of gas delivered at the city gate under the contract restricting use to consumption at the generating plant were, in fact, used for that purpose. As a matter of physical fact, molecules of gas sold to the City under the restricted-use contract were necessarily resold to ultimate consumers without converting the restricted-use sale into a sale for resale. The inescapable fact is that, where all elements of separability are present, molecular tracing is not determinative. In a close parallel to Petitioners' contention with regard to Lo-Vaca's sale, some *molecules* of the restricted-use gas in *Hastings* would be resold, but the restricted-use *volumes* of the fungible commodity were always identifiable.

Notably, in *Hastings* the Commission filed with this Court a brief in opposition to the granting of a writ

of *certiorari* arguing that the separability test enunciated by this Court in *California* was controlling and that there existed "no conflict of decisions and no need for further review" (Brief of Federal Power Commission in Opposition, In the Supreme Court of the United States, No. 656, October Term, 1954, pp. 13, 18). This Court denied *certiorari* [349 U.S. 920 (1955)].

Similarly, *North Dakota* presents facts substantially the same as those presented by Houston's sale. Gas was sold by Signal Oil and Gas Company and Amerada Petroleum Corporation at the outlet of a gasoline plant in North Dakota to Montana-Dakota Utilities Company. Four contracts were involved. Each producer entered into an interstate resale contract and an intrastate resale contract. All gas for all four sales was commingled in Montana-Dakota's line. Before the commingled stream left the State of North Dakota, some volumes were metered off to four communities in satisfaction of the two intrastate, nonjurisdictional contracts.

The court affirmed the Commission's denial of jurisdiction over the restricted-use volumes, holding (247 F. 2d 173, 177):

> "We think, then, the gas sold pursuant to such 'firm gas' contracts for consumption in North Dakota is clearly distinguishable from the 'dump gas' sold in interstate commerce. There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the

> quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' contracts are easily identifiable and determinable."

But the Commission contends that *California*, *Hastings*, and *North Dakota* are distinguishable because each involves only a single source of supply for the restricted use, whereas here gas consumed at the points of restricted use could physically be derived from many sources (F.P.C. Pet. 17). Curiously, the Commission argues that molecular identification is prerequisite to determination of no jurisdiction if gas from several sources is involved, but if gas from only one physical source is sold under several contracts molecular tracing is not necessary (F.P.C. Pet. 17).

But obviously the number of sellers or sources of gas is irrelevant, for in each of the decided cases the *molecules* of gas sold under the restricted-use contracts were not identifiable, because of commingling, and might be resold. The critical fact in each case, as here, is that the *volumes* of gas sold under the restricted-use contracts remain separately identifiable. The manifest irrelevance of the Commission's distinction doubtless accounts for the significant fact that it played no part in the rationale of any one of the three court opinions or in the Commission's own decisions from which Petitioners now seek to escape.

It is simply irrelevant whether gas for the restricted use may be attributable to only one seller, if that seller supplies both restricted-use and nonrestricted-use gas which is commingled in the buyer's pipeline. For example, in *Hastings*, some molecules of the gas delivered to the City at the city gate under the nonjurisdictional contract clearly would, because of commingling, be resold by the City, and, correspondingly, some of the gas

sold under the nonrestricted-use contract would be consumed at the generating plant. It is equally clear that some molecules of the restricted-use gas supplied in *North Dakota* would, because of commingling, be resold in interstate commerce.

Furthermore, the Commission's suggested importance of a single source is at odds with the facts in *North Dakota*, for there were *two* sellers, in that case, not just one. Gas was sold under four contracts. The record in *North Dakota* shows that Signal contributed 15% of the total volumes of gas to the commingled stream. The combined total volume delivered annually into the commingled stream was approximately 6,867,270 Mcf. Of this amount, Signal delivered only about 1668 Mcf under its restricted-use contract. Undeniably, it would be impossible to trace the commingled molecules of gas from the point of entrance into Montana-Dakota's line to the point of consumption. Molecules delivered to the points of restricted use could come from the 1,028,423 Mcf delivered under Signal's unrestricted-use contract or from the 5,827,727 Mcf delivered under Amerada Petroleum Corporation's unrestricted contract, or even from the 9,452 Mcf delivered to Montana-Dakota under Amerada's restricted-use contract.[6] Conversely, molecules of the restricted-use gas could and did flow into interstate commerce for resale.

The number of sellers or sources of gas has no relevance to jurisdiction. The Commission's argument leads to the absured conclusion that a sale which is non-

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[6] The Examiner's decision in *North Dakota* contains findings from which the data referred to above is derived. See *Montana-Dakota Utilities Co.*, 16 F.P.C. 401, 405 (1956).

jurisdictional when begun may suddenly be converted into a jurisdictional sale through no action on the part of seller or change in operations of the buyer other than the purchase of additional supplies of gas.

Clearly, the lower court was correct when it adhered to the rationale of the separability test as enunciated in *California* and applied in *Hastings* and *North Dakota*.

II.

Decision Below Preserves the Congressional Division of Jurisdiction Provided in the Natural Gas Act

It is beyond dispute that, in the absence of commingling, Lo-Vaca's restricted-use sale would be a nonjurisdictional sale in interstate commerce for El Paso's own use. Correspondingly, Houston's sale would be a nonjurisdictional sale in intrastate commerce. As the court below noted, if the restricted-use volumes were physically segregated, the Commission would not claim jurisdiction over the sales (323 F. 2d at 191, California Pet. App. A, p. 3). But California claims the decision below would open a "regulatory gap" (California Pet. 13-15). The Commission, though urging the existence of a "gap" in regulation (F.P.C. Pet. 18) is careful to couch its allegation in terms, not of lack of power of the State of Texas to regulate the sales, but in terms of what it believes to be a disinclination on the part of Texas to exercise an admitted power (F.P.C. Pet. 18). The Commission's tacit admission of state power is significant, for jurisdiction under the Act is based upon the nature of the transaction, not the manner in which the state or federal

government chooses to utilize its power.[7] *F.P.C.* v. *Southern California Edison Co.*, No. 71, October Term, 1963, decided March 2, 1964, 84 S. Ct. 644, 649-650.

The arguments urged by Petitioners in order to raise a spectre of a regulatory gap would blur the "bright line" drawn between federal and state jurisdiction in the Natural Gas Act. *F.P.C.* v. *Southern California Edison Co.*, 84 S. Ct. at 651, *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507, 516-517 (1947). Petitioners overlook the division of jurisdiction and the limited delegation of Commission power which was reviewed in detail in *Panhandle* when this Court concluded (332 U.S. at 516-517):

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale."
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> * * * * *
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> "Direct sales for consumptive use of whatever sort were excluded.
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> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the

[7] Obviously, for example, prior to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) the fact that the Commission did not choose to exercise jurisdiction over producer sales for resale in interstate commerce did not mean that the Commission lacked jurisdiction. Similarly, the manner of state regulation is not determinative of its jurisdiction, or conversely of federal jurisdiction delegated by the Natural Gas Act.

> line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed.[12]" (Footnote omitted)

Clearly, since passage of the Natural Gas Act there has been, and can be, no regulatory gap (*id.*, at 517-520). Such a gap existed before enactment because states were powerless to regulate sales for resale in interstate commerce. *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *P.U.C. of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). But, states have always had the power to regulate direct sales in interstate commerce taking place within their borders and all sales in intrastate commerce. *P.U.C. of Kansas* v. *Landon*, 249 U.S. 236 (1919); *Pennsylvania Gas Co.* v. *P.S.C. of New York*, 252 U.S. 23 (1920); *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507 (1947). The purpose of the Natural Gas Act was to authorize the Federal Government, through the Commission, to regulate only in that area of interstate commerce where states are powerless to act; namely, sales for resale in interstate commerce (332 U.S. at 516). Hence, the language of the Natural Gas Act is explicit and restrictive in its delegation that [15 U.S.C. § 717(b)]:

> "The provisions of the act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . but shall not apply to any other transportation or sale of natural gas . . ."

The comprehensive regulatory scheme prescribed by by the Act and noted by this Court in *Panhandle* (332 U.S. at 520) and in *Southern California Edison*, 84 S. Ct. at 649-651, of course, does not provide the Commission with power over transactions which do not come

within its limited delegation of authority. As this Court held, the Act does not give power over any direct sales in interstate commerce of "whatever sort" or over sales in intrastate commerce (332 U.S. at 517).

This obvious fact was also recognized by this Court, in *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 17 (1960), which involved producer sales made in interstate commerce directly to the consumer. After the sale, the restricted-use gas was commingled in a transporter's pipeline with other gas to be sold for resale in interstate commerce. Significantly, so far as the Commission's novel single-source distinction is concerned (*supra*, pp. 14-15), gas in Transcontinental's commingled stream came from many sources, not just one. But this Court agreed that the Commission had no jurisdiction over the producers' direct sales even though the gas was physically commingled with other volumes in the interstate line so that the molecules could not be traced to the point of restricted use (*id.*, at 4).

It is significant, in light of the Commission's attack here upon the separability test, that direct sale-transportation arrangements like the one in *Transcontinental* are common in the industry. Customarily, such an arrangement involves a direct sale by the producer in or near the field to an ultimate consumer, such as a power company, which uses the gas in generation of electric energy. Thus, as in the Lo-Vaca restricted-use sale, the producer may make a sale in Texas for consumption in another state. *Cf.*, *Houston Texas Gas & Oil Corp., et al.*, 16 F.P.C. 118 (1956), affirmed *sub nom.*, *Florida Economic Advisory Council* v. *F.P.C.*, 251 F. 2d 643 (D.C. Cir. 1957) *cert.* denied, 356 U.S. 959 (1958). After the direct sale to the con-

summer, the gas is physically commingled in an interstate pipeline with other gas to be resold.

The direct sale is not subject to Commission jurisdiction, as held in *Transcontinental*. Yet, the arguments newly urged by the Commission in its attempt here to assert jurisdiction over the Lo-Vaca and Houston sales would be equally applicable to the direct sale-transportation arrangements. Since there is no regulatory gap with respect to the direct sale in Texas for power-plant consumption in New York or Florida, by the same token there can be no regulatory gap with respect to a direct sale in Texas for El Paso's consumption in New Mexico and Arizona. The "regulatory gap" argument is obviously spurious.

The direct sale-transportation arrangements also serve to illustrate the general industry practice, accepted by the Commisison, to treat gas as a fungible commodity. Indeed, the Commission bases the exercise of its certification power in cases of major national importance upon express recognition of the fungibility concept. For example, in the *Houston Texas Gas & Oil* case, *supra*, the Commission authorized construction of a new pipeline system extending from southern Texas to Florida. Of a total initial system capacity of 250,000 Mcf per day, 150,000 Mcf or three-fifths, was dedicated to transportation of gas purchased in Texas by electric generating companies in Florida. The remaining 40% of the capacity was dedicated to resale gas (16 F.P.C. at 121-122). The pipeline is dependent for its existence upon the nonjurisdictional sales to the power companies.[8]

[8] Another example of Commission certification of a major interstate pipeline company which was dependent in significant part upon transportation volumes is *Trans-Continental Gas Pipe Line Corp., Inc.*, 7 F.P.C. 24, 29, 34 (1948).

Plainly, the comprehensive scheme envisioned by the Act, followed by the Commission until this proceeding, and still followed in cases of major national importance involving direct sale-transportation arrangements, is preserved, not disrupted, by the lower court's decision. It is the Commission, through its inconsistent refusal to apply the separability test, which would disrupt the comprehensive scheme of federal and state regulation provided by the Act.

Furthermore, it simply is not accurate for the Commission to suggest that the State of Texas has no interest in regulation of transactions within its jurisdiction (F.P.C. Pet. 18). The Commission, itself, has recently found that, with regard to Lo-Vaca's existing operations (*United Gas Pipe Line Co.* v. *Coastal States Gas Producing Co.*, Docket No. CP64-75, Opinion No. 419, issued February 10, 1964, mimeo. ed., p. 4):

> "* * * [A] certificate of the Texas Railroad Commission has been filed with us in accordance with the provisions of Section 1(c) of the Act to the effect that the rates, services, and facilities of Lo-Vaca involved in its sales of natural gas for resale in Texas are subject to its [The Texas Railroad Commission's] regulatory jurisdiction and it is exercising such jurisdiction."

Patently, the State of Texas does have an interest in regulation of transactions falling within reach of its authority. Also, with regard to the power of the State of Texas to regulate sales, it is pertinent to note that city gate rates are fixed by the Texas Railroad Commission. *State of Texas* v. *Public Service Corporation of Texas*, 88 S.W. 2d 627 (1955), Tex. Civ. App. error refused; *Railroad Commission* v. *Houston Natural Gas Corp.*, 289 S.W. 2d 559 (1956). And under applicable

Texas law, the Railroad Commission has equally broad power to regulate industrial sales. *United Gas Corp. v. Shepherd Laundries Co.*, 189 S.W. 2d 485 (1945).

Nor may it be suggested that the Commission's power over activties within its delegated authority is in any way diminished by its lack of authority over the Lo-Vaca and Houston restricted-use sales. The Commission admits that commingling does not convert direct sale-transportation agreements into jurisdictional sales (R. 1107) and that commingling does not affect the jurisdictional status of restricted-use sales where all gas comes from one source (F.P.C. Pet. 11). Therefore, there is no basis for a contention that Commission jurisdiction over the Lo-Vaca and Houston sales is essential to maintain regulation over all commingled volumes in El Paso's system.

In this regard, also, it should be noted that the concern of California and S. Cal. Gas that gas sold for resale at the California border will be unregulated is groundless. The Commission will continue to regulate El Paso's sales for resale at the California border. And, pursuant to standard regulatory procedure used to allocate jurisdictional and nonjurisdictional costs, the gas resold at the California border will be attributed to gas purchased by El Paso under jurisdictional sales, not Lo-Vaca and Houston restricted-use sales.

Moreover, a review of the entire operations involving the Lo-Vaca and Houston restricted-use gas demonstrates that the Commission's power within its specifically delegated sphere remains plenary. Thus, the gas sold to Lo-Vaca for its restricted-use sale will come from separately dedicated reserves sold under producer contracts (R. 25-26, 875). These producer sales will be sales for resale in interstate commerce

and hence subject to Commission regulation. Significantly, the Commission's area price policy relating to producer sales for resale in interstate commerce will be applicable to these sales to Lo-Vaca.

Lo-Vaca will gather and transport this restricted-use gas from points of production to the Coquat Station. This delivery by Lo-Vaca will be subject to the Commission's certification power over transportation of natural gas in interstate commerce [Section 1(b), 15 U.S.C., § 717(b)]. Of course, Lo-Vaca filed an application for a certifiate authorizing such transportation (R. 812-817). The transportation of Lo-Vaca's restricted-use gas in El Paso's system will likewise be transportation in interstate commerce regulable by the Commission, and El Paso must obtain a certificate therefor. But *Transcontinental* shows that such authority does not extend to direct sales in interstate commerce, nor does it extend to the intrastate activities of Houston or El Paso.[9] (365 U.S. at 17)

In this context, the lower court aptly concluded (323 F. 2d at 194-195):

> "* * * The method of segregation used here seems to be the most practical one. No one has suggested to us any reason why the mixing or commingling of this gas with other gas hampers the regulation of sale of the 'jurisdictional' gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consumation of these plans."

---

[9] It is established beyond all question that a company may participate in jurisdictional and nonjurisdictional activities by use of the same facilities. *Colorado Interstate Gas Co. v. F.P.C.*, 324 U.S. 581, 585-586 (1945).

III.

The Decision Below Does Not Conflict With Any Decision of This Court or of Any Other Court

Cases involving the separability test when applied to commingled volumes are relatively few, perhaps bespeaking the relative infrequency of this type of transaction. As demonstrated above, (*supra*, 10-16) the lower court correctly analyzed the applicable cases in reaching its conclusion. The lower court was also correct in rejecting the contention urged upon it by Petitioners that this case is controlled by decisions such as *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882 (5th Cir. 1957), or *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414 (1952), which did not involve the separability test at all.

In *Deep South*, gas for intrastate use and for resale in interstate commerce was sold under one contract. The court rejected contentions that an admitted sale for resale in interstate commerce was excluded from Commission jurisdiction either on the ground that it took place during production and gathering, or because it involved the sale of casinghead gas for extraction of heavy hydrocarbons, or because it was not a sale of natural gas (247 F. 2d 887-889). *Deep South* did not involve the separability test. It dealt with the scope of exemptions from the primary grant of jurisdiction in Section 1(b) over sales for resale in interstate commerce. But that question is not here. The question here is whether the Lo-Vaca and Houston sales fall within the primary grant, *i.e.*, whether they are sales for resale in interstate commerce.

Petitioners' reliance upon language of the opinion in *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 529 (1945) is likewise misplaced. They suggest that the holding in *Connecticut* was that "Federal

jurisdiction was to follow the flow of electric energy, an engineering and scientific test, rather than a legalistic or governmental test." But, this is not the Court's holding. That quoted language merely explained the scope of the bill as originally drafted (324 U.S. at 529-530). Indeed, the Court noted that such a test would extend jurisdiction to the toaster on the breakfast table. But when the bill was enacted, jurisdiction was limited by Congress to cover only those transactions not regulable by the states. Therefore, legal concepts, such as "sales for resale," "direct sales," and "local distribution" were utilized in prescribing and proscribing Commission jurisdiction.

By the same token, cases cited by the Commission (F.P.C. Pet. 14) dealing with the scope of constitutional authority of the Federal Government over interstate commerce have no application here. None involve the limited delegation of Section 1(b) of the Act. None involve the separability test.

Neither are the holdings in *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414 (1952) or *F.P.C.* v. *Southern California Edison Co.*, 84 S.Ct. 644, controlling here. In *Penn Water* the question presented was whether a sale for resale escaped federal jurisdiction because a large proportion of the energy resold was produced in the state of consumption. The Court held that the sale of all of the energy under *one* contract was jurisdictional because it included some energy from out of state. Admittedly, the Commission had jurisdiction over the sale of the out-of-state energy, and since all energy was sold in a *single* sale under a *single* contract, Commission regulation of the out-of-state energy necessarily extended to all energy sold. (343 U.S. at 419-420). This Court distinguished the *Penn Water* holding in *California* where it stated (345 U.S. at 317):

> "* * * We held there [in *Penn Water*] that the federal rate authority must apply to all electricity sold, despite the fact that it was made up of power transmitted across state lines as well as that produced locally. The impossibility of separating interstate from intrastate electricity consumed by each purchaser is patent. In such a case, federal rate jurisdiction must attach to each distributor's negotiated agreement with the seller irrespective of occasional and unpredictable use of nonjurisdictional intrastate power.
>
> "There, however, the problem was whether the sales of electricity were in 'interstate commerce'. Here, it is a different one whether the entire sale is a 'sale for resale.'"

This Court then continued to announce the separability test (*supra*, pp. 7-8).

Similarly, in *Southern California Edison*, this Court's holding did not reach the question here. That case decided that when energy is sold for resale under one contract which includes out-of-state energy, such sale is a sale in interstate commerce subject to Commission regulation. Commission jurisdiction attaches in such instances, the Court held, even though the energy would be consumed within the state of sale and regardless of Commission regulation of preceding transactions involving the same energy on its journey from the point of production to the point of consumption. In essence, the *Southern California Edison* case holds that there is no exemption under Section 201(b) of the Federal Power Act analogous to the Section 1(c) amendment to the Natural Gas Act.[19]

[19] Section 1(c) of the Natural Gas Act declares that sales for resale of gas received within the boundary of a state are matters of local, not national concern, if *all* such gas is ultimately consumed within such state. 15 U.S.C. § 717(c). See Appendix D to California Petition.

It is significant in the context of the Commission's argument against the separability test here to note that the Commission itself utilized the separability test in the *Southern California Edison* case when that proceeding was before it *concurrently with the Lo-Vaca and Houston proposals.* The Commission held, in circumstances remarkably analogous to the Lo-Vaca facts, that a direct sale in interstate commerce for pumping purposes was not converted into a jurisdictional transaction because of commingling. The Commission's rationale is particularly pertinent here for it held [26 F.P.C. 223, 235 (1961)]:

> "In the present case we have concluded that Edison's presently effective rate is embodied in its 1945 contract. The rate set forth in the contract is composed of a demand charge and an energy charge applicable both to the delivery for resale and the deliveries for pumping purposes, but these deliveries were metered separately. In its order of August 17, 1954, the PUC, in addition to prescribing separate rate schedules for the deliveries for resale at the City of Colton Substation on the one hand, and the deliveries for pumping purposes on the other, permitted separate metering and billing for the pumping sales, and this *separate metering* and *billing* commenced September 13, 1954, and has continued since that time.
>
> "Thus a *separation* of the *pumping deliveries from the deliveries for resale has plainly been achieved.* Irrespective of the invalidity of the PUC's orders, a *separation in fact* is not only feasible but *has been accomplished.* Under *United States* v. *Public Utility Comm'n., California Electric Power Co.* v. *F.P.C.* and *City of Hastings* v. *F.P.C., supra*, there is no justification for our asserting jurisdiction in such a case over the separated non-jurisdictional transaction. We fur-

> ther find that if the question of separation had been properly presented by appropriate filings in 1954, the same conclusion should have been reached. We conclude that the *public interest* will be served by treating the deliveries for pumping purposes alone as having been separate sales since September 13, 1954, and by treating only the sale for resale as subject to our jurisdiction." [Emphasis supplied].

Clearly, since it was in the public interest to "treat", through use of the separability test, a sale of electric energy for pumping purposes as nonjurisdictional,[11] it is likewise in the public interest to "treat", through use of the same criteria, a sale of gas for compressor fuel as nonjurisdictional.

From the foregoing, it is apparent that the petitions herein, do not present a case of first impression. This Court, lower courts, and the Commission, itself, have all applied the separability test consistently in determining the jurisdictional status of transactions. The Commission's attempt here to expand its jurisdiction to cover the Lo-Vaca and Houston restricted-use sales simply because of commingling of gas in El Paso's line constitutes a radical departure from these precedents. As recognized by the court below, such an extension of jurisdiction would require modification of Section 1(b) of the Act which can be accomplished only by Congress (323 F. 2d at 194).

---

[11] Contrast this Commission holding giving viability to the separability test in a sale of electric energy with its counsel's attack on the separability test (F.P.C. Pet. 19, note 16) on the ground that such test might be applied to a sale of electric energy.

CONCLUSION

For all the foregoing reasons, Respondents submit that the lower court correctly interpreted the scope of Commission jurisdiction under Section 1(b) and correctly applied applicable court precedents. The lower court's decision does not create any gap in regulation but preserves the regulatory scheme set forth in the Act as construed by this Court. Moreover, the decision recognizes the practical nature of natural gas as a fungible commodity while maintaining the integrity of Commission regulation within its delgated authority.

Accordingly, Respondents urge that the petitions for writs of *certiorari* in Nos. 914, 915, and 990 be denied.

Respectfully submitted,

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FILED
MAY 27 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 46

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

vs.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, AND EL PASO NATURAL GAS COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Reply Memorandum for the People of the State of California and the Public Utilities Commission of the State of California

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 914

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, AND EL PASO NATURAL GAS COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Reply Memorandum for the People of the State of California and the Public Utilities Commission of the State of California

In accordance with Rule 24(4) of the Revised Rules of the Supreme Court of the United States, the Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California), submit this memorandum in reply to the joint brief filed by Lo-Vaca Gathering Company (Lo-Vaca), Houston Pipe

Line Company (Houston), and El Paso Natural Gas Company (El Paso), Respondents, in opposition to the petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit filed by California (No. 914), by Southern California Gas Company and Southern Counties Gas Company of California (Southern California Companies) (No. 915), and by the Federal Power Commission (Commission) (No. 990).

1. In its petition (p. 13) California pointed out that the decision of the court below creates an attractive gap in the comprehensive scheme of effective regulation over the transportation, production, and sale of natural gas. *Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507, 520 (1947); *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961). By narrowly interpreting Section 1(b) of the Natural Gas Act the decision of the Court of Appeals in this case has exempted the sales of natural gas to be made by La Vaca and Houston pursuant to so-called "restricted-use" contracts from the Commission's regulatory jurisdiction over sales for resale in interstate commerce. A serious regulatory gap is created because, in the absence of federal regulation over these sales, the State of Texas, where the gas is produced, gathered, and sold to the interstate pipeline, cannot realistically be expected to regulate such sales for the protection of gas consumers in California, Arizona and New Mexico. Moreover, it is beyond dispute that California, Arizona and New Mexico are without authority to regulate these Texas sales.

Respondents nevertheless suggest that no regulatory gap exists because it is claimed that Texas has the power to regulate the La Vaca and Houston "restricted-use" sales and

is interested in the regulation of transactions within its jurisdiction (Br. in Op., pp. 16-23). Irrespective of Texas' power to regulate, respondents are careful not to assert that Texas will, in fact, exercise whatever jurisdiction it may possess for the protection of California natural gas consumers. On the contrary, reference is made by respondents to regulation by Texas of natural gas sales where the interest of that state in protecting its consumers is manifest, i.e., city gate sales and industrial sales of local concern (Br. in Op., pp. 21-22).

California has not and does not now assert that Texas has no interest in regulating sales of natural gas where such gas is consumed in Texas and paid for by Texas consumers. What California does assert is that Texas has no conceivable interest in regulating sales of natural gas the cost of which is to be borne by California consumers. And this observation is made only for the purpose of pointing out that federal regulation of these sales is required in order to preserve the comprehensive system of *effective* regulation which this Court has consistently held is the purpose of the Natural Gas Act. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp., supra.* By denying to the Commission regulatory jurisdiction over the Lo-Vaca and Houston "restricted-use" sales the decision of the court below creates a gap in effective regulation and presents an important jurisdiction question which this Court should review.

At page 22 of their brief in opposition, respondents state:

> "In this regard, also, it should be noted that the concern of California and S. Cal. Gas that gas sold for resale at the California border will be unregulated is groundless. The Commission will continue to regulate El Paso's sales for resale at the California border. And, pursuant to standard regulatory procedure used to allocate jurisdictional and nonjurisdictional costs,

> the gas resold at the California border will be attributed to gas purchased by El Paso under jurisdictional sales, not Lo-Vaca and Houston restricted-use sales."

California does not claim that the Commission as a result of the decision below will be deprived of regulatory jurisdiction over gas sold for resale at the California border. The rates at which gas is sold for resale by El Paso to the California public utility gas distribution corporations, the Southern California Companies and Pacific Gas and Electric Company, under familiar cost of service ratemaking principles include all the costs incurred by El Paso in providing its service, including not only the cost of the gas delivered but all associated costs such as the cost of compressor fuel utilized by El Paso in transporting gas from Texas to California. In the quoted paragraph, respondents apparently overlook the fact that whether El Paso labels its gas as "fuel" or as "purchased gas", the cost incurred must ultimately be borne by California ratepayers.[1] It is therefore no comfort to California that "gas resold at the California border will be attributed to gas purchased by El Paso under jurisdictional sales, not Lo-Vaca and Houston restricted-use sales."

On the contrary, the distinction that respondents here attempt to draw goes far to reveal the so-called "restricted-use" contracts as artificial devices to avoid effective regulation at the very point where it can most efficiently be undertaken for the protection of natural gas consumers, that is,

---

1. Respondents emphasize that the Lo-Vaca and Houston "restricted-use" sales are not only supported by contractual identification but will be separately identifiable through installation of meters, which will facilitate the bookkeeping involved (Br. in Op., p. 4). Presumably California gas consumers may be required through rates to defray over a period of time the cost of these metering facilities as well as the high cost of the gas to be earmarked for fuel purposes.

at the point where the sale is made to the interstate pipeline.

2. The "separability test" used by respondents as a template for their carefully tailored "restricted-use" contracts and relied upon by the Court of Appeals in holding that the Commission is without jurisdiction to regulate these sales should not be applied to defeat effective regulation and to create a gap in the comprehensive scheme of regulation envisioned by Congress when it enacted the Natural Gas Act. The "separability test" has its origin in this Court's opinion in *United States v. Public Utilities Commission of California*, 345 U.S. 295, 317 (1953), where the facts of that case precluded its application, and, more importantly, where there existed no danger of the creation of a regulatory gap. Moreover, there was no question of the creation of a regulatory gap in either of the two cases relied upon by the court below where the test was in fact applied: *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954), cert. denied 349 U.S. 920 (1955), and *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957). Neither of these cases, in denying federal regulatory jurisdiction, deprived the gas consumers concerned of effective regulation, for such consumers could be effectively protected by the state regulatory agencies in question.

In the instant case, however, the application of the "separability test" defeats the purpose of the Natural Gas Act which was enacted to protect natural gas consumers from exploitation at the hands of private natural gas companies. *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 611 (1944). California insists that the regulatory consequences of the "restricted-use" contracts entered into by Lo-Vaca and Houston and El Paso should not, and

cannot be ignored. It should be recognized that the "separability test" was evolved in cases involving a question of distribution of regulatory jurisdiction between the federal government and the states and should not be utilized in this case to sustain an artificial arrangement designed by the parties to eliminate the possibility of effective regulation.

* * * * * * *

California views this case as containing important legal issues having significant national regulatory and economic impact. For the reasons stated herein, as well as for the reasons contained in California's petition for a writ of certiorari, California respectfully submits that the question here presented fully deserves review by this Court, and California prays that its petition for writ of certiorari be granted.

Respectfully submitted,

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May 25, 1964

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FILED
AUG 27 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964
No. 47

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, a corporation, and HOUSTON PIPE LINE COMPANY, a corporation, and EL PASO NATURAL GAS COMPANY, a corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

JOINT BRIEF FOR THE PETITIONERS.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

JOINT BRIEF FOR THE PETITIONERS.

Opinion Below.

The Opinion of the Court of Appeals [R. 365-376] is reported at 323 F.2d 190.

Jurisdiction.

The Judgment of the Court of Appeals for the Fifth Circuit was entered September 24, 1963 [R. 377]. A timely Petition for Rehearing was denied on December 17, 1963 [R. 379]. The Joint Petition for a Writ

of Certiorari was filed March 13, 1964, and was granted June 1, 1964 [...., U.S. ...., 12 L. ed 2d 496]. [R. 381]. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1). See also Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

Statute Involved.

Section 717 of the Natural Gas Act is the statute involved; Act of June 21, 1938, c. 556, 52 Stat. 821-833 (1938), 15 U.S.C. §§717-717w (1958), and is set forth as Appendix A, *infra*, page 1.

Question Presented.

The basic issue to be determined is whether the jurisdiction of the Federal Power Commission follows the *actual flow* of a commingled supply of natural gas from Texas to California in interstate commerce for resale, or whether this jurisdiction may be avoided by a *contract provision* which, while recognizing the actual flow, provides that for *contractual purposes* this commingled supply of gas shall be used for nonjurisdictional purposes.

Statement of the Case.

Petitioners herein were Intervenor-Respondents in the court below and were also Intervenors before the Federal Power Commission in its Opinion No. 348 (26 F.P.C. 606).

For the purposes of this Petition, we accept the facts as found by the Federal Power Commission and which are set forth in its Opinion No. 348 [R. 254-277].

El Paso Natural Gas Company (El Paso) is a natural gas pipeline company with an interstate pipeline system extending from its origin within the State of Texas to the State of California. El Paso proposes to increase its sources of supply, by obtaining gas from south Texas, through contracts which it has entered into with Houston Pipe Line Company (Houston) and Lo-Vac Gathering Company (Lo-Vaca). In order to obtain the gas from these sources, it will be necessary to extend the El Paso interstate pipeline system from Sonora in west Texas eastward to Three Rivers, Texas. It is proposed that El Paso Gas Supply Company, a subsidiary of El Paso, build the 227.6-mile 30" pipeline required for this purpose. Both Houston and Lo-Vaca would deliver their contracted supplies of gas to El Paso at Three Rivers, Texas. At this point, the Houston and Lo-Vaca gas would enter the El Paso Natural Gas Company interstate pipeline system as extended.

The Federal Power Commission found that the gas to be provided by Houston and by Lo-Vaca, pursuant to the contracts which are the subject of this proceeding, would form part of a commingled stream of gas flowing from Texas through New Mexico and Arizona into California, and the commingled stream of gas would physically be used to supply El Paso's customers gas which would be in turn resold by them in interstate commerce. The contracts under which those gas supplies would be furnished provide in

essence that the gas is to be used for nonjurisdictional purposes. Despite the contractual provisions, the gas would actually flow as heretofore described. None of the parties herein has at any time claimed that the gas supplied by Houston and Lo-Vaca would not physically flow in interstate commerce for resale. Respondents contend, however, that the contractual provisions for nonjurisdictional use of the commingled gas prevail over the admitted flow and sale of the gas in interstate commerce for resale. The majority opinion in the court below conceded that this Houston Lo-Vaca gas would actually be resold in interstate commerce. The decision states at page 191 of 323 F.2d:

> "The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted . . ." [R. 367].

Despite this, the majority opinion held that the contractual provisions circumvented the jurisdiction of the Federal Power Commission.

ARGUMENT.

I.

The Flow of Gas in an Interstate Pipeline System as Part of a Commingled Supply of Gas Destined for Resale in Interstate Commerce Subjects Such Gas to the Jurisdiction of the Federal Power Commission.

Gas to be provided by Houston and by Lo-Vaca under and by virtue of their contracts here in question with El Paso,

> ". . . inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California, . . ." [R. 211].

The majority opinion in the lower court concedes on page 191 of 323 F.2d that:

> ". . . the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted. . ." [R. 367].

The jurisdiction of the Federal Power Commission applies to:

> ". . . the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale. . ." (15 U.S.C. §717(b)).

In the case of *F.P.C. v. Natural Gas Pipeline Company* (1942), 315 U.S. 575, 86 L. ed 1037, this Court stated:

> "The sale of gas originating in one state and its transportation and delivery to distributors in any

> other state constitutes interstate commerce, which is subject to regulation by Congress." (315 U. S. 575, 582)

Accordingly, the basic facts are: Because gas to be sold under the contracts in question "inevitably would be physically transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California," it is the duty of the Federal Power Commission to carry out the purpose of the Natural Gas Act by exercising its jurisdiction over the sales for resale in interstate commerce involved in each of the contracts here in question.

Any lingering doubt which could have existed that this is so, has been completely dispelled by the decision reached by this Court in the case of *F. P. C. v. Southern California Edison Co.*, (1964), 376 U.S. 205, 11 L. ed 2d 638. In that case, commonly referred to as the *Colton* case, this Court reversed the decision of the Court of Appeals for the Ninth Circuit, and affirmed a finding and decision by the Federal Power Commission that because out-of-state energy from the Hoover Dam in Nevada was included in the energy delivered by Southern California Edison Company to its customer, the City of Colton, California, the Federal Power Commission had jurisdiction over the sale of electrical energy as a sale in interstate commerce for resale. In reaching that conclusion this Court stated:

> "We have said of Part II of the Power Act that 'federal jurisdiction was to follow the flow of electric energy, *an engineering and scientific, rather than a legalistic or governmental, test.' Connecticut Light & Power Co. v. Federal Power*

Comm'n, 324 U.S. 515, 529, ... (Italics supplied.)" *F.P.C. v. Southern California Edison Co.*, 11 L. ed 2d 638-643.

Moreover, any possible contention that the flow of electric energy under the Federal Power Act might be different from the flow of gas energy under the Natural Gas Act has been rejected by this Court's statement that:

> "In reviewing the court's ruling on this question we do not write on a clean slate. In decisions over the past quarter century we have held that Congress, in enacting the Federal Power Act and the Natural Gas Act, apportioned regulatory power between state and federal governments according to a test which this Court had developed in a series of cases under the Commerce Clause. *The Natural Gas Act grew out of the same judicial history as did the part of the Federal Power Act with which we are here concerned; and §201(b) of the Power Act has its counterpart in §1(b) of the Gas Act, 15 USC §717(b), which became law three years later in 1938.*" (Emphasis supplied.) *F.P.C. v. Southern California Edison Co.*, 11 L. ed 2d 638, 644.

This, of course, because of the provisions of Section 1(b) of the Natural Gas Act, is why the Federal Power Commission assumed jurisdiction over the instant sales involved in the present proceeding before this Court.

Gas flowing through an integrated interstate pipeline system will be devoted to total system use. In the case of El Paso, which devotes 80 per cent of the gas which it sells to its market in California, the in-

evitable consequence is that additional gas supplies obtained by it will in major portion be disposed of by way of a sale for resale to the California market. Because the Federal Power Commission recognized these elementary facts of the operation of the natural gas business, and of El Paso Natural Gas Company as an integrated interstate pipeline company, the Commission held the instant sales subject to its jurisdiction as sales in interstate commerce for resale.

The Houston and Lo-Vaca gas supplies will flow through El Paso's interstate pipeline system as part of a commingled supply of gas destined for resale in interstate commerce. The corresponding jurisdiction of the Federal Power Commission, must and does attach. *Deep South Oil Co. of Texas v. F.P.C.*, 247 F.2d 882 and *Shell Oil Co. v. F.P.C.*, 247 F.2d 900.

Justice Rives in his dissent in this proceeding before the Fifth Circuit pointed out at page 197 of 323 F.2d:

> "In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g., Sprout v. South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR v. Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co. v. Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co. v. Power Comm'n*, 1945, 324 U.S. 515, 529: 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.'" [R. 376]

It is, of course, the *Connecticut* case, 324 U.S. 515, relied upon by Justice Rives which this Court has reaffirmed recently in the *Colton* case, supra, in reaching its conclusion that Federal Power Commission jurisdiction follows the physical flow of energy in interstate commerce.

Conclusion.

For the reasons stated, we request that the judgment of the court below be reversed.

Respectfully presented,

Date: August 25, 1964.

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By *John Ormasa*

Affidavit of Service by Air Mail.

In the Supreme Court of the United States. October Term, 1964. No. 47.

Southern California Gas Company, a corporation, and Southern Counties Gas Company of California, a corporation, Petitioners, vs. Lo-Vaca Gathering Company, a corporation, and Houston Pipe Line Company, a corporation, and El Paso Natural Gas Company, a corporation, Respondents.

State of California, County of Los Angeles, ss.

Viola Figg, being first duly sworn, deposes and says: That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for John Ormasa, William H. Owens, Milford Springer, and Robert M. Olson, Jr., who are the attorneys for the Petitioners in this action; that this affiant is of the firm of Parker & Son, Inc., 241 East Fourth Street, who are the printers and agents in this matter for said attorneys, and have their offices in the City of Los Angeles, State of California.

That on the 25th day of August, 1964, affiant served the within Joint Brief for the Petitioners on the Respondents in this action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Respondents at the business residence addresses of said attorneys, as follows: George D. Horning, Jr., Esq., C. Frank Reifsnyder, Esq., Harry Albrecht, Esq., Hogan & Hartson, 800 Colorado Bldg., Washington, D.C., Attorneys for El Paso Natural Gas Co.; Howard E.

Wahrenbrock, Esq., Solicitor, 441 "G" St. N. W., Washington 25, D. C., Attorney for Federal Power Commission; Hugh Q. Buck, Esq., Jefferson D. Giller, Esq., Richard L. McGraw, Esq., Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of Southwest Bldg., Houston 2, Texas, Attorneys for Houston Pipe Line Co.; Bradford Ross, Esq.; Sherman S. Poland, Esq., Ross, Marsh & Forster, 725-15th St., N. W., Washington 5, D. C., Attorneys for Lo-Vaca Gathering Co.; J. Calvin Simpson, Esq., Gerald A. Laster, Esq., John Murphy, Esq., 514 State Bldg., San Francisco 2, Calif., Attorneys for Public Utilities Commission, State of California; and Hon. Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., at the county seat of said county, by then sealing said envelopes and depositing the same with air mail postage thereon fully prepaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG

Subscribed and sworn to before me this 25th day of August 1964

MARGARET H. FALES
Notary Public, in and for the County of Los Angeles, State of California

My Commission Expires January 11, 1966

[Seal]

APPENDIX A.

The relevant parts of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821-833 (1938), 15 U.S.C. §§717-717w (1958)) involved in this proceeding are as follows:

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)].

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boun-

dary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

Sec. 2. When used in this Act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner", means the Federal Power Commission, and a member thereof, respectively. [52 Stat. 821 (1938); 15 U. S. C. § 717a]

Sec. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes,

or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f(a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f-(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further

proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. §717f(d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate

shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. 717f-(e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U.S.C. §717f(f)]

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U.S.C. §717f(g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U.S.C. §717f(h)]

Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time with-

in which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U. S. C. §717o]

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 57

FEDERAL POWER COMMISSION, PETITIONER,

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, AND EL PASO NATURAL GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit (R. 365-376) are reported at 323 F.2d 190. The opinions and orders of the Federal Power Commission (R. 256-277, 332-334) are reported at 26 FPC 606 and 840.

JURISDICTION

The judgment of the Court of Appeals setting aside the Commission's order was entered on September 24, 1963 (R. 377). A timely petition for rehearing was

denied on December 17, 1963 (R. 379). On March 10, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to April 15, 1964 (R. 380). The petition was filed on April 10, 1964, and certiorari was granted on June 1, 1964 (R. 381). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

When a supplier sells natural gas to an interstate pipeline company, which commingles it with gas from other sources and uses some of the mixture for local sales or in the operation of the pipeline, but sells the bulk in interstate commerce, may the supplier and pipeline avoid the jurisdiction of the Federal Power Commission over "sales in interstate commerce for resale" by stipulating, contrary to the physical fact, that all of the supplier's gas will be consumed within the State or by the pipeline?

STATUTE INVOLVED

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, provides in pertinent part:

> Section 1 (b). The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural

gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2. When used in this act, unless the context otherwise requires—

* * * * *

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

STATEMENT

This case involves the jurisdictional status, under Section 1 (b) of the Natural Gas Act, of sales which Lo-Vaca Gathering Company and Houston Pipe Line Company propose to make to El Paso Natural Gas Company.

El Paso, one of the country's largest interstate natural gas pipelines, obtains its gas supplies chiefly in the Panhandle and Permian Basin areas of western Texas and the San Juan Basin in northwestern New Mexico. Its main transmission lines extend in two parallel systems from western Texas, across New Mexico and Arizona, to the California border. While it has many customers along the route, the bulk of its deliveries are made at the Arizona-California border to three California distribution compañies, including

two of the intervenors below, Southern Counties Gas Company and Southern California Gas Company.[1]

The Lo-Vaca contract. On March 15, 1960, El Paso entered into a contract with Lo-Vaca Gathering Company for the purchase of gas in the Texas Gulf area, to be delivered for El Paso's account to El Paso Gas Supply Company, a wholly owned subsidiary, at a point in the immediate vicinity of Three Rivers, in Live Oak County, Texas (R. 256-257).[2] Gas Supply was to construct a compressor station at Three Rivers (the Coquat Station) and a 227-mile pipeline from Three Rivers to one of the southernmost points of the present El Paso system, the Sonora plant in Sutton County, Texas (R. 256-257).[3] The contract provides for the delivery to El Paso of 50,000 Mcf of gas per day at an initial price of 22¢ per Mcf, with escalations

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[1] This description is based upon the statement of facts in *People of the State of California* v. *Federal Power Commission*, 296 F.2d 348 (C.A.D.C.), reversed, 369 U.S. 482. It describes the El Paso system prior to the merger with Pacific Northwest Pipeline Corporation. Commission authorization of that merger was set aside by this Court in the cited case and divestiture was ordered in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651.

The State of California and the two companies named in the text are the petitioners in Nos. 46 and 47, this Term.

[2] Another El Paso-Lo-Vaca contract, dated May 16, 1960, is admittedly a sale in interstate commerce for resale, and is not involved in this proceeding. Lo-Vaca is not itself a producer of natural gas, but will purchase the gas it proposes to resell to El Paso from a number of producers (R. 122-123).

[3] A map of the El Paso System with these proposed additions appears at R. 335, the last page of the main volume of the Joint Appendix in the court below.

during the twenty-year term up to 26¢ (R. 142, 257).[4] It also contains the following provisions, which, in the view of the majority of the court below, excluded Commission jurisdiction (R. 149):

> All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

In Article X, Section 2, the contract adds (R. 142):

> It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale. * * *[5]

This "restricted use" agreement provides for the separate metering of the contract volumes prior to their delivery into El Paso's system at Three Rivers. El Paso has stated that it will meter the gas used for fuel purposes in its New Mexico and Arizona facilities to make certain that this amount invariably exceeds the volumes of gas simultaneously taken from Lo-Vaca

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[4] The contract originally called for the delivery of an average of 50,000 Mcf of gas per day at Coquat. The amount was later increased to 80,000 Mcf per day (R. 257).

[5] Lo-Vaca has indicated, however, that it intends to sell gas under both contracts even if the Federal Power Commission has jurisdiction over the allegedly "restricted use" contract (R. 258).

under the "restricted use" contract (R. 260, 366).[6]

The Houston sale. By a contract dated July 19, 1960, Houston Pipe Line Company proposed to sell to El Paso, over a 20-year term, an average of 70,000 Mcf of gas per day, which it would purchase from various producers. The price to El Paso is to be determined under a formula which, in effect, adds 6⅛¢ per Mcf to Houston's average gas-purchase cost (R. 94-95). As in the case of Lo-Vaca, Houston's gas would be delivered to Gas Supply's pipeline at the Coquat Station. It, too, would be metered separately (R.59). The Houston contract contains a "restricted use" provision by which Houston purports to limit its gas to consumption within Texas (R. 78):

> * * * it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and convenants that the gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Philips Petroleum Company in Ector County, all located wholly within the State of Texas. * * *

---

[6] The metering of volumes of gas consumed in the compressor stations and other facilities of the pipeline is not peculiar to the present case; indeed, it is required by the Commission's Uniform System of Accounts in order to determine what portion of gas purchase costs should be attributed to the transmission-expense accounts. F.P.C. Uniform System of Accounts for Natural Gas Companies (Class A and Class B) Account 854, 18 C.F.R. Part 201, Account 854.

The contract provides further for the metering of the gas used at the various Texas points and includes a covenant by El Paso that the Texas uses will at all times exceed the amount simultaneously taken from Houston (R. 78-79). Houston's president acknowledged that his company's gas would actually be used outside of Texas (R. 53, 55, 56-57).

Soon after the execution of the contract, Houston petitioned the Commission for a declaratory ruling that the proposed sale would not be a sale in interstate commerce.[7] Since most of Houston's supply was purchased under contracts permitting the producers to cancel if their gas were to be resold in interstate commerce (R. 180-182), Houston alleged need for a prompt determination.

The facts of gas flow. The gas to be supplied by Lo-Vaca and Houston would be physically commingled after entry into Gas Supply's pipeline at the Coquat Station (R. 60). A small portion of this stream would be used as fuel in operating the Coquat compressor station, some would be used up by way of "line loss" in Gas Supply's pipeline from Coquat to Sonora, and some would be consumed at El Paso's Sonora dehydration plant (R. 61, 116, 117, 259). The rest would move, commingled with gas from the Sonora plant and other sources, through El Paso's mainline to Benedum Junction in Upton County, Texas, where the stream would divide (R. 61, 119, 259).

Thence one portion would flow toward El Paso's

[7] See F.P.C. Rules of Practice and Procedure, § 1.7 (c), 18 C.F.R. 1.7 (c).

Goldsmith Plant in Ector County, Texas, then northward to Plains, Texas (R. 259), and then westward, via El Paso's northern pipeline, through New Mexico and Arizona to the California border (*ibid*). Gas from numerous sources would enter the stream between Benedum Junction and Plains; at Plains itself, a stream from the Texas Panhandle would be added, and in New Mexico, San Juan Basin gas would enter the northern line (R. 62-65, 115, 259, 335).

The other portion of the stream would flow from Benedum Junction through Crane County, Texas, to El Paso's Keystone compressor station in Texas (R. 259).[8] From there, the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas, again into New Mexico near the city of El Paso, and on to the border of California. In New Mexico, gas is added from various sources in that State and in Texas (R. 259). El Paso, however, had a pending application to construct a line from the Keystone Station to west Texas, and the Commission assumed the existence of that facility for purposes of this case. The building of this line would make it possible for El Paso to supply its west Texas compressor stations with gas produced and transported entirely in Texas. But, even then, the particular source or seller of the gas so used could not be determined since that gas would come from the

[8] This is the center of El Paso's Permian Basin facilities and one of its most important areas of gas supply. The flow diagram of the Permian Basin portion of the El Paso system which appears at R. 119 gives a fair impression of the great number and complexity of gas flows into the lines on this one portion of El Paso's system.

commingled stream leaving El Paso's Keystone Station (R. 259-260).[9]

Although both the El Paso-Lo-Vaca and El Paso-Houston contracts specify restricted uses for the gas sold under those contracts, it is conceded by respondents' officials that the gas sold by Houston and Lo-Vaca will flow in a commingled stream with gas from other sources and that at least a portion of the Houston and Lo-Vaca gas will in fact be used for resale in interstate commerce outside of Texas. See, *e.g.*, testimony of Houston's president (R. 56-57) and of El Paso's chief pipeline engineer (R. 66).[10]

The decision below. The Commission (one Commissioner dissenting as to the Houston sale) held that the sales by both Houston and Lo-Vaca would be sales for resale in interstate commerce and thus subject to its jurisdiction (R. 254-274). The court below (Judge Rives dissenting) set aside the Commission's determinations. Although it acknowledged that most of the gas sold under the restricted use contracts would in fact be resold in interstate commerce, the court concluded that gas is fungible and that separation into different uses could be determined by contract. The majority observed that while it "may well be that the

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[9] Since the time of the decision below, El Paso has withdrawn the application for these particular pipeline facilities. This withdrawal does not preclude El Paso from filing a new application to build comparable facilities.

[10] As a corollary to these admissions, it was conceded that the exhibits (R. 116, 117) introduced by respondents purporting to specify the particular facilities that would utilize Houston or Lo-Vaca gas were based entirely on the attribution to those uses made by the contracts with El Paso (R. 54-55, 360-361).

State of Texas has no incentive to regulate the cost" of the gas sold to El Paso under the "restricted use" contracts, the existence of such a regulatory gap has "no relevance in interpreting the statute." Judge Rives, dissenting, stated that in "no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality" (R. 376).

ARGUMENT

THE HOUSTON AND LO-VACA SALES ARE SUBJECT TO FEDERAL REGULATION NOTWITHSTANDING THE RESTRICTED-USE PROVISIONS OF THE CONTRACTS, SINCE A SUBSTANTIAL PART OF THE GAS SUPPLIED THEREUNDER WILL IN FACT BE USED FOR RESALE IN INTERSTATE COMMERCE

Introduction and Summary

It is settled that where part of a stream of natural gas or electric energy sold under a single contract is interstate in character and is resold by the purchaser, the entire transaction falls within the Commission's jurisdiction, even though the remainder is consumed by the purchaser itself or within the producing State. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 419-420; *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 316-318; *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 209, n. 5. Here the parties concede that a substantial part of the gas sold under both the Houston and Lo-Vaca contracts will in fact travel out of Texas and be resold to purchasers

in other States (*supra*, p. 9). But for the contract language, therefore, both transactions would admittedly be subject to federal regulation. The question thus becomes: Is the jurisdictional status of a sale governed by what the purchaser actually does with the gas—*i.e.*, by the physical facts of gas flow—or is it controlled by the bare recitals of contract?

In our view, a contractual declaration of the type involved here cannot deprive the Commission of jurisdiction over a sale of gas to an interstate pipeline company where in fact the contract will not be performed in the manner recited. That declaration is not fulfilled merely by showing that the volume of gas used by the pipeline for the specified purpose (*e.g.*, compressor fuel) is equal to or greater than the volume covered by the contract; it must also be established that the gas used for that purpose was actually furnished by the supplier who seeks the exemption, and not by some other supplier. Here, the short of the matter is that only a small and indeterminate fraction of the gas sold by the two suppliers will be used for the purposes specified in the contracts.[11]

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[11] Different questions might arise if the restricted-use stipulation had been limited to that portion of the seller's gas which represented his *pro rata* contribution to the total volume of the restricted-use gas received by the pipeline from all sources (or, what is the same thing, a fraction of the seller's gas equal to that fraction of the pipeline's total intake which was used for the restricted purpose). That, however, is not the situation here. Lo-Vaca and Houston claim exemption not merely for a portion of their gas, but for all of it. The contracts arbitrarily attach a "restricted use" label to 100 percent of the volumes covered, despite the certainty that most of that gas will be resold outside of Texas. Thus, even if, contrary to our belief, it were permissible to compute the not-for-resale (or the

Federal regulation cannot be skirted by "a simple stroke of the draftsman's pen." Cf. *United States* v. *Township of Muskegon*, 355 U.S. 484, 486. The holding below—that the Commission's jurisdiction may be defeated by contractual declarations bearing no relationship to reality—is, we submit, without basis in the statute and contrary to the controlling decisions of this Court; by the same token, it invites serious gaps in the comprehensive regulatory scheme which Congress designed for the protection of consumers.

A. *The realities of gas flow, rather than artificial contractual stipulations, determine whether a sale is "in interstate commerce"*

We consider, first, the Houston contract, which purports to limit consumption of that seller's gas to points in Texas. While conceding that much of this gas will inevitably flow across State lines into New Mexico, Arizona, and California, Houston contends that, in light of its agreement with El Paso, the sale is not to be regarded as one in interstate commerce.[12] We disagree.

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intrastate) component of the seller's gas on the basis of a *pro rata* allocation, and feasible to do so, the contractual provisions here in issue would still be without jurisdictional significance.

[12] Respondents' claim (Br. in Op. 3) that their "restricted use" volumes would remain separately identifiable at all times is palpably without substance. The most that the metering of volumes for different purposes will accomplish is to assure that El Paso will at all times use sufficient quantities of gas for the restricted purposes called for by the Houston and Lo-Vaca contracts, so that it would not be impossible on a volume basis for the amounts delivered under that contract to be used for the restricted contract purposes. But this in no way alters the admitted fact that at least a substantial

Under both the Natural Gas and Federal Power Acts, this Court has consistently relied upon the physical facts in determining whether sales are in interstate commerce.[12] *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 687; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 467. As declared in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 529, and reiterated last term in *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 209 n. 5, federal jurisdiction follows the flow of the energy; the test under Part II of the Power Act is "engineering and scientific, rather than * * * legalistic or governmental." The same kind of test applies under the Natural Gas Act. The *Interstate* case, *supra*, in which the Court upheld the Commission's conclusion that the sales were in interstate commerce, illustrates its application (331 U.S. at 687):

> * * * The Federal Power Commission found that the gas sold to the three pipe-line companies moves "... in a constant flow from the mouths of the wells from which it is produced through pipe lines belonging to Interstate to the compressor station of the respective purchaser, and thence through said compressor stations into the pipe line of said respective purchaser and thus into and through

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portion of gas delivered by Houston for alleged use within Texas will in fact flow into other States for consumption there.

[12] Section 2 (7) of the Natural Gas Act defines "interstate commerce" as "commerce between any point in a State and any point outside thereof * * *."

> states other than Louisiana . . ., all without interruption, and said gas is so destined from the moment of its production." The Commission further found that "The gas transported and sold by Interstate to these three pipe line companies continues its flow in interstate commerce and, as an established course of business well known to Interstate, is destined for resale for ultimate public consumption in . . . markets outside Louisiana."

In short, the sale of gas which actually crosses a State border at any stage of its progress from well-head to ultimate consumption is "in interstate commerce." [14]

Since the actuality of transmission in commerce is the controlling consideration, this Court, in *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 68-72, rejected a contention that federal jurisdiction depends on a specific intent to engage in interstate commerce. The Second Circuit's decision in *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F.2d 953, certiorari denied, 319 U.S. 741, bears upon the same point. There, the court considered

[14] Arguably, *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550, a case long antedating the passage of the Natural Gas Act, might be taken to imply that a sale from a single stream of gas composed partly of gas from local wells and partly of out-of-State gas would be subject to State, rather than federal, jurisdiction where the portion of in-State gas in the mix exceeds the volume of the sale. To the extent that this is a permissible interpretation of the opinion, it is clear that the case has no continuing vitality in light of the specific holdings of this Court following the enactment of Part II of the Federal Power Act and of the Natural Gas Act. See, *e.g.*, the *Pennsylvania Water, Public Utilities Commission of California and Southern California Edison* cases cited in the text, *supra*.

in some detail the conditions under which a company which sold energy in the State of generation might nonetheless be engaged "in interstate commerce." It left open the possibility that a casual sale in the State of origin might not be "in interstate commerce," despite the subsequent interstate transportation of the energy by the purchaser, where the seller has no foreknowledge of that transportation. It concluded, however, that there could be no question of federal jurisdiction where the seller was "fully aware that some * * * energy is unavoidably destined by the buyer for interstate use." 131 F.2d at 960. Accord, *Deep South Oil Co.* v. *Federal Power Commission*, 247 F.2d 882 (C.A. 5).

In other, but related, contexts, this Court has also disregarded provisions of contracts which place a fictitious construction upon business transactions solely for the purpose of achieving a particular jurisdictional result. In *Sprout* v. *South Bend*, 277 U.S. 163, 168, the Court unanimously ruled that a motor bus line could not acquire the status of an exclusively interstate carrier simply by holding itself out as such and requiring each passenger to purchase a ticket to an out-of-state point, when in fact its passengers were regularly permitted to alight before reaching the State line. Similarly, in *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390, the Court, upholding a State tax against the claim that the taxed sales were in interstate commerce, refused to give effect to a bill of lading which "seems to have had no other use than * * * to try to convert a domestic transaction into one of interstate com-

merce." 280 U.S. at 394. It "is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause'; * * * at least when the contract achieves nothing else." *Id.* at 394-395.

Even more closely in point is *B. & O. S.W.R.R. Co.* v. *Settle*, 260 U.S. 166, 170, which involved an elaborate contractual scheme designed to make one segment of an interstate transportation appear to be wholly intrastate. This was accomplished by interrupting the transit and delivering the goods to a "consignee" for several days before reshipping them to their ultimate destination. Looking to the shipper's actual business purpose—to get his goods to the ultimate point—the Court concluded that the entire transportation from beginning to end constituted interstate commerce, to which a higher interstate through rate was applicable.[15] Justice Brandeis' opinion for the Court declared (260 U.S. at 170): "* * * whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between the shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration * * *."[16] See, also, *United States* v. *San Francisco*,

[15] In contrast are such cases as *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257, where the activities carried on within the State by the shipper after receipt of goods from interstate commerce have genuine business utility so that the goods may be fairly regarded as having come to rest; then any subsequent transportation within the State is a separate intrastate matter.

[16] In one of the cases there cited, the Court, in holding a transportation arrangement to be interstate, had explained that "[t]o

310 U.S. 16, 28; *Higgins* v. *Smith*, 308 U.S. 473, 477-478.

The "restricted use" provisions involved in the instant case are precisely the type of artifice which this Court has repeatedly condemned. Although the gas used to fuel El Paso's compressors (both in Texas and other States) comes from a variety of sources, El Paso has singled out particular suppliers for special treatment, arbitrarily labelling 100% of their contract volumes as "non-jurisdictional." These provisions could have no conceivable purpose or effect other than to circumvent regulation. Neither their removal from the Houston or Lo-Vaca contracts nor their insertion in the contracts of other suppliers would require the slightest change in El Paso's actual operations or in the routing of gas through its system.

B. *Similarly, the realities of gas flow determine whether a sale is "for resale"*

It is equally clear that the sale by Lo-Vaca is a sale "for resale," notwithstanding the contractual declaration that the gas shall be used by El Paso exclusively for fuel.[17] For it is undisputed that a substantial part of this "restricted use" gas will in fact be resold.

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hold otherwise would be to disregard * * * the substance of things and make evasions of the act of Congress quite easy." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 526-527.

[17] As noted above (p. 5), the Lo-Vaca contract declares that the gas purchased thereunder is to be used in El Paso's facilities "outside of the State of Texas." Lo-Vaca's contention is that the sale, though in interstate commerce, is not a sale "for resale." See the Natural Gas Act, Section 1 (b), *supra*, p. 2.

The same emphasis upon concrete facts that has governed the question whether a transaction is "in interstate commerce" has also characterized this Court's approach to the question whether a sale is "for resale" and thus subject to the Commission's rate regulation. In *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, a utility sold electric energy to the Navy Department, which used about 80% of it for its own consumption and resold the remainder to persons residing in a government housing project. This Court held that the entire transaction was subject to regulation by the Power Commission, stating (345 U.S. at 316):

> Certainly the concrete fact of resale of some portion of the electricity transmitted from a state to a point outside thereof invokes federal jurisdiction at the outset, despite the fact that the power thus used traveled along its interstate route "commingled" with the other power sold by the same seller and eventually directly consumed by the same purchaser-distributor * * *.[18]

The Court dismissed as "insubstantial" the company's contention that the contracts were not "for resale" because they did not state as much. 345 U.S. at 316. See, also, *California Electric Power Co.* v. *Federal Power Commission*, 199 F.2d 206 (C.A. 9), certiorari denied, 345 U.S. 934; *Deep South Oil Co.* v. *Federal Power Commission*, 247 F.2d 882 (C.A. 5). There is no reason

[18] We recognize that the Court left open the question whether federal jurisdiction would extend to "an essentially separate transaction covering the power directly consumed by the purchaser," *id.*, at 317-318. See discussion, *infra*, pp. 22-29.

why a contract such as Lo-Vaca's, which purports to preclude resale, albeit the parties know that an appreciable portion of the gas will in fact be resold, should have any greater significance for jurisdictional purposes than a contract, such as the one in the *California* case, which simply ignores the fact of resale altogether.[19]

Respondents maintain, however, that a contrary result is indicated by this Court's decision in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1.[20] In that case, a New York utility

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[19] Despite the decision below, the Fifth Circuit in *Shell Oil Co.* v. *Federal Power Commission*, 247 F.2d 900, 902-903, certiorari denied, 355 U.S. 930, had earlier expressly rejected the argument that contractual language controls jurisdiction when at variance with the facts. There, one of the issues was whether Shell's contract was one "for resale" notwithstanding a contractual declaration that the gas was conveyed to the purchaser for the purpose of manufacturing gasoline. The court noted that the contract did not purport to forbid resale of the gas but indeed expressly accorded the purchaser the right to sell any surplus gas remaining after the extraction of the gasoline. But it went on to add (247 F.2d at 903):

> • • • But be this as it may, the legal determination of the question rests not upon the parties' use of the word "manufacture," but upon the actual disposition of the gas. The record here clearly shows that the gas sold to Phillips is resold by it and thus, as in Deep South, there can be no question that petitioner is making sales in interstate commerce of natural gas for resale within the meaning of the Act.

[20] Another "direct" sale case cited by respondent is *Houston Texas Gas & Oil Corp.*, 16 FPC 118, 17 FPC 303, affirmed *sub. nom. Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F.2d 643 (C.A. D.C.), certiorari denied, 356 U.S. 959. There the court of appeals agreed with the Commission that there was no need to decide in that proceeding whether the "direct" sales in the field by Louisiana producers to a Florida power company were

(Consolidated Edison) purchased gas directly from the producers in Texas for use as boiler fuel and contracted with an interstate pipeline company (Transco) to have it transported to the place of consumption. It was assumed, both by the parties and by the Commission, that the sale was what it purported to be—a "direct" sale for Edison's own consumption— and that, as such, it was not subject to FPC regulation. However, in the exercise of its jurisdiction over the transportation of gas in interstate commerce, the Commission denied the pipeline a certificate on the ground, *inter alia*, that the purported end use of the gas as boiler fuel was an "inferior" use from the standpoint of conservation. This Court, after noting preliminarily and without discussion that the "direct" sale was non-jurisdictional (365 U.S. at 4), affirmed the denial of the transportation certificate. Respondents now point out that the gas allegedly sold to Edison would have been commingled in the pipeline with other gas owned by Transco, and that a substantial part of it would undoubtedly have been included in Transco's deliveries to its regular custom-

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jurisdictional (251 F.2d at 646-647; 16 FPC at 134; 17 FPC at 310). A finding that the sales were jurisdictional, it was urged, could result in cancellation of the "direct" sale contract and thus put in doubt the feasibility of the project. Since the Commission had required elimination of the contract cancellation clauses, the decision of the jurisdictional question was regarded as unnecessary. In *Houston*, which was decided several years before *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, the Commission, again with the court's concurrence, had held that it was unnecessary to decide initial price questions in a certificate proceeding since it had continuing rate jurisdiction.

ers. They argue that since the physical flow of the gas was not thought to give the Commission jurisdiction over the sale to Edison, it should likewise not confer jurisdiction over the sales here; the terms of the contract, they urge, should be controlling in the one case no less than in the other.

It may well be, as respondents suggest, that the reasoning which demands reversal of the decision below would similarly have justified the Commission in asserting jurisdiction over the so-called "direct" sale in *Transcontinental*. That was a question which the parties did not raise either before the Commission or in this Court, and which neither tribunal had need to consider in view of the Commission's refusal to authorize transportation of the gas.[21] The case is hardly a prece-

[21] The Commission's failure to notice the issue *sua sponte* may be due in part to two factors which give a different cast to a purported "direct" sale of boiler fuel gas to an industrial user or electric utility (such as Edison) as distinguished from a purported sale of compressor fuel gas to an interstate pipeline company (such as El Paso). 1) In the former case, unlike the latter, any excessive fuel cost incurred by the purchaser is not reflected in higher rates to the ultimate consumers of natural gas, whose protection was the principle purpose of the Act. In addition, the ready availability and relative simplicity of conversion to competing fuels is a powerful protection against the incurring of any excessive costs for such fuel gas by an electric utility (such as Edison) that would adversely affect its electric rates. 2) An industrial plant or electric utility, which purchases gas from only one, or at most a few, suppliers and uses it for its own consumption, has fewer opportunities to discriminate among suppliers or resale customers by means of contractual manipulations than does an interstate pipeline, which obtains gas from a multitude of sources and resells the bulk of it to numerous wholesale and retail customers, both interstate and intrastate.

dent for a point which was unnecessary to decision and never the subject of deliberation.[22]

C. *To permit limitation of the Commission's jurisdiction on the basis of artificial contractual stipulations would afford major opportunities for discrimination and create a class of independent producer sales which are free from effective regulation, State or federal*

We have argued above that the governing statutory language and the decisions of this Court compel the conclusion that the jurisdictional status of a sale depends upon the realities of gas flow, rather than upon contractual declarations which have no basis in fact and no conceivable purpose other than to escape regulation.

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[22] We suggest that a sound analysis of the transaction in *Transcontinental*, consistent both with the facts of gas flow and with the price arrangements formulated by the parties, would be as follows:

The producer has made a sale of gas to Edison in the field. Edison, in turn, has entered into an exchange agreement with Transco, under which (a) Edison delivers that gas to Transco in Texas; (b) Transco delivers an equivalent volume of gas to Edison's generating plant in New York; and (c) Edison pays Transco a fee for transporting the latter gas to New York. Since the gas purchased by Edison in the field was immediately resold (*i.e.*, exchanged for equivalent volumes) to Transco, the field sale is subject to the Commission's jurisdiction. The same is true of Edison's sale to Transco (or exchange with it), since the gas would be used by the pipeline for resale to its regular customers. The reciprocal sale by Transco to Edison of equivalent volumes in New York would be a sale for direct consumption and therefore non-jurisdictional. However, under its plenary power over "the transportation of natural gas in interstate commerce" (§§ 1 (b) and 7 (c) of the Act, 15 U.S.C. 717 (b), 717f (c))—the power successfully asserted in *Transcontinental*—the Commission would retain authority to certificate the pipeline's transportation service on such conditions as might be required by the public convenience and necessity.

We point additionally to certain of the consequences which would follow from a contrary holding.

(1) If a pipeline, in selling gas, were free to designate by contract the particular source (supplier or field) from which the gas should be deemed to come, albeit the gas in fact was an indistinguishable part of a stream emanating from many sources, the pipeline would be in a position to discriminate in favor of its "non-jurisdictional" customers (industrial users or intrastate distributors) by purportedly allocating to them its lower cost gas. Suppose, for example, that a pipeline was able to purchase gas in field X at a lower price than it had to pay producers in field Y, and that the gas from the two fields was commingled before delivery to customers. Suppose further that for competitive reasons the pipeline thought it advantageous to offer an industrial user a lower rate than it could profitably afford to charge its jurisdictional customers. Under the reasoning of the court below, the pipeline could reduce its rate to the industrial user without diminishing its overall revenues, simply by providing in its contract with the user that the gas supplied thereunder would be the cheaper gas from field X, while leaving its utility customers—and the ultimate consumers whose protection is the central object of the Natural Gas Act—to bear the higher cost of the gas purchased in field Y (or at least a disproportionate share of those costs).

(2) Another form of discrimination invited by the decision of the court of appeals is the preferential treatment of favored suppliers. This is clearly illus-

trated by the present case. If the decision below stands, El Paso, by a stroke of its pen, will have completely immunized from federal scrutiny the prices charged by two suppliers for gas which is no less destined for interstate markets than the gas of any other El Paso suppliers.

(3) Furthermore the decision below would create a class of sales by independent producers which are free from any effective rate regulation, State or federal. See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1. For no State could be expected to regulate a sale to an interstate pipeline for ostensible use in the latter's own operations. The producing State (here, Texas), though perhaps having the power, would have little interest in regulating a item of pipeline cost which would be reflected chiefly in the rates paid by consumers in other States. And the consuming States that might have an interest (here, New Mexico, Arizona, and, particularly, California) would have no power to regulate sales of gas outside their own borders. The end result is a gap in the comprehensive regulation which Congress has established for the protection of consumers. As this Court noted in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, *supra*, 365 U.S. at 28:

> Congress did not desire an "attractive gap" in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to

> control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation. * * *

Petitioners answer (Br. in Op. 22) that the price paid by El Paso for the gas it obtains under these "nonjurisdictional" contracts will not be passed on to the ultimate consumers because the Commission, in regulating El Paso's resale rates, will attribute "the gas resold at the California border * * * to gas purchased by El Paso under jurisdictional sales; not Lo-Vaca and Houston restricted-use sales." This contention completely ignores the fact that a pipeline's cost of service includes not only the cost of purchased gas but all the costs incurred in delivering that gas, including the cost of compressor fuel. Thus, whether the gas purchased by El Paso from Lo-Vaca and Houston is deemed to be used "for resale" or for compressor fuel, the cost will in either case be reflected in the rates charged to the ultimate consumer. As this Court stated in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 693:

> * * * Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.

To be sure, the Commission has power, in fixing a pipeline's rates, to disallow those items of cost which are shown to be plainly improvident. That power, however, is scarcely a substitute for the ability to pass upon producer prices at the time they are proposed. If it were, there would be no need for the Commission to regulate producer sales at all, for it could protect consumers simply by making appropriate adjustments in the pipeline's cost of service. But to say that a producer's proposed price is too high to warrant certification is not necessarily to say that the pipeline, once having paid that price, should later be denied the opportunity to recover its full costs (including a reasonable return)—especially where that denial might weaken the company's financial position and impair its ability to render efficient service.

Under the Fifth Circuit's decision, each interstate pipeline that uses a portion of the stream of gas to fuel its compressors and other auxiliary facilities (and that is almost every company) would be free to enter into as many non-jurisdictional contracts as it could fit within the volumetric limits of its use for these purposes. The Commission's "Statistics of Natural Gas Companies—1962" (the latest year available) show that the 40 major natural gas pipeline companies consumed more than $85,000,000 worth of gas in operating their utility facilities, principally compressor stations. This represents almost 4 percent of the total gas purchase costs of those companies.[23] Thus, without in any

[23] In El Paso's case, the cost of gas used to operate its utility plant is more than 7-¼ percent of its total gas purchase costs. *Ibid.*

way changing their actual operations, pipelines could create a substantial unregulated market for the benefit of particular producers merely by inserting into contracts of their choosing restrictive language similar to that employed in the Lo-Vaca and Houston contracts.[24]

D. *Cases in which the entire stream of gas is traceable to a single source are not controlling*

In holding the sales non-jurisdictional, the court below relied primarily upon a dictum of this Court in the *Public Utilities Commission of California* case, and upon the decisions of two courts of appeals, *City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F.2d 31 (C.A. D.C.), certiorari denied, 349 U.S. 920, and *North Dakota* v. *Federal Power Commission*, 247 F.2d 173 (C.A. 8). We submit that the court's reliance upon those authorities was misplaced.

In the *California* case, as stated above (p. 18), this Court held that gas sold to a purchaser (the Navy) which consumed 80 percent of the energy but resold the balance was subject in its entirety to federal regulation. The Court also noted that it was leaving open the question whether the Commission's authority would extend to "an essentially separate transaction covering the power directly consumed by the purchaser" (345 U.S. at 317-318). The question thus reserved was later

[24] In addition to its direct impact on a purchaser's cost, the establishment of a sizable unregulated intrastate market could readily generate pressures to increase the general price level at which gas will be available for jurisdictional purposes, and also cause the triggering of favored-nations and other contract price-changing clauses. See *Federal Power Commission* v. *H. L. Hunt*, 376 U.S. 515, 524-525; *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23-28.

answered in the negative by the courts of appeals in *Hastings* and *North Dakota*, both of which concurred in the Commission's disclaimer of jurisdiction over certain "essentially separate" transactions pertaining to gas either not resold by the purchaser or not in interstate commerce. As we show *infra*, it is quite unnecessary for present purposes to decide whether *Hastings* and *North Dakota* were correctly decided, *i.e.*, whether the Commission could properly have asserted jurisdiction over the transactions there in issue. This much at least is plain: the only rationale which might plausibly be thought to justify those decisions is wholly inapplicable to the present case and they therefore furnish no support whatever for the result reached below.

For the sake of clarity, we begin with this Court's comments in *California* as to the possible relevance of a "separate transaction"—comments which must be placed in context. There, the Navy received its entire supply of electric energy from a single source. Thus, a separate transaction such as the Court contemplated—one which pertained to the measurable amount of energy directly consumed by the Navy—would *ipso facto* have covered the precise amount of "not-for-resale" energy actually supplied by the particular seller whose rates were in issue. In other words, where "B" purchases *all* of its gas from "A" (which makes delivery through a single line of pipe) and "B" thereafter consumes 80 percent of the gas and resells the balance, one cannot say, to be sure, which molecules of "A" 's gas will be used by "B" and which resold; but one can say, with absolute assurance, that both the 80 percent and

the 20 percent constitute gas delivered by "A", rather than by some other supplier. The physical facts, viewed from "A" 's standpoint at the time of sale or delivery, would call for the conclusion that all of the gas put into the line is part of an indistinguishable stream subject in its entirety to the Commission's jurisdiction (see discussion, *supra,* p. 10); viewed from "B"'s standpoint at the time he allocates the gas to particular uses, however, it might be argued that the 80 percent actually consumed by "B" is both measurable in quantity and identifiable as to source, and that these physical facts are sufficient to justify a difference in regulatory treatment as between this gas and the remaining 20 percent.

The same can be said of the *City of Hastings* case, *supra*. There, the city received all its gas from an interstate pipeline at a number of city-gate delivery points, and used the supply partly for resale and partly as boiler fuel in its own electric generating plant; the volumes used at the plant were metered there after traveling through the city's system commingled with the volumes used for resale. The pipeline's federally-regulated rate schedule contained a provision making the rates inapplicable to "gas used or consumed by Utility * * * for industrial purposes." 221 F.2d at 34. Rejecting the city's contention that the pipeline's delivery at the city gate constituted a single sale subject in its entirety to FPC jurisdiction, the Commission found a long history of separate contracts and separate rates applicable to the gas used at the power plant; it concluded that the power plant gas was the subject of a separate sale for direct consumption and hence outside the Commission's

jurisdiction. We stress that in *Hastings*, as in *California*, it was possible to determine precisely how much of the gas supplied by that seller (Kansas-Nebraska) was resold by the buyer in interstate commerce and how much the buyer used for its own industrial purposes.[25]

By contrast, Lo-Vaca's gas would constitute but a small fraction of the total pouring into El Paso's system. Since it is not possible (as it was in *Hastings*) to trace the gas used at the compressor station to any particular seller, there is no realistic basis *from any standpoint* for the contractual assertion that the gas used for compressor fuel is that supplied by Lo-Vaca. Indeed, the compressor facilities are presently being fueled from a portion of the total stream supplied by numerous sellers, and the gas furnished by Lo-Vaca would merely become a minute and indistinguishable part of that stream.[26]

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[25] The contracts with Kansas-Nebraska did not, of course, purport to assign particular molecules to particular uses, or even to specify in advance what proportions of the Kansas-Nebraska gas would be used for resale and for boiler fuel, respectively. Since all the gas came from the same seller, it was feasible to make that determination after the event.

[26] Contrary to respondents' suggestion (Br. in Opp. 8, 27-28), the Commission's decisions in *Colorado Interstate Gas Co.*, 19 FPC 1012, 1022, and *City of Colton* v. *Southern California Edison Co.*, 26 FPC 223, set aside on other grounds *sub. nom. Southern California Edison Co.* v. *Federal Power Commission*, 310 F.2d 784 (C.A. 9), reversed, 376 U.S. 205, are fully consistent with its position here. *Colorado Interstate* followed the *Hastings* decision in a case where the pipeline had originally supplied gas for the purchaser's consumption as part of a single indivisible sale covering all of the purchaser's requirements, but where the parties later adopted a separate contract applicable to the sale for consumption. In *Colton*, as the decision shows (26 FPC at 226, 235), the delivery of energy

The *North Dakota* case, *supra,* bears the same relationship to the Houston sale as *Hastings* bears to the Lo-Vaca transaction. At issue there was the jurisdictional status of a sale in North Dakota by two producers (Signal and Amerada) to an interstate pipeline (Montana-Dakota) at an extraction plant which Signal operated at Tioga, North Dakota. From there the pipeline ran westward into Montana, serving four North Dakota towns by means of laterals branching off the line, and transporting in a single stream the gas which was to be diverted to the towns and that which was to continue across the border for resale in Montana. Significantly, the Tioga plant was the pipeline's only source of supply in the State; no other gas entered the pipeline between Tioga and the Montana border.[27] Although the pro-

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for the city's water pumping stations, which were held to be direct sales (and thus non-jurisdictional), were not only covered by separate schedules over which California was exercising jurisdiction, but in addition were made at points and over connecting lines separate and distinct from those used for the sales for resale to Colton. This aspect of the case was not at issue in the review proceedings.

Obviously, neither case, any more than *Hastings,* stands for respondents' proposition that the existence of a separate contract alone, absent the reality that the seller is actually supplying the gas which is used for the direct consumption, is sufficient to establish the non-jurisdictional status of a sale.

[27] Subsequent to the decision in *North Dakota,* these conditions have changed. Now the gas from the extraction plant at Tioga is commingled, prior to the so-called "intrastate" sales, with gas sold to Montana-Dakota by other producers from other sources. Nonetheless, only gas sold by Amerada and Signal at Tioga is contractually treated as gas sold in "intrastate" commerce. In view of the additional sources of supply, the Commission, following its opinion here, held that new firm gas sales by Amerada and Signal were sales for resale in interstate commerce. *Montana-Dakota Utilities Co.,* 30 FPC 200. That order was recently set aside by the

ducers executed separate contracts with Montana-Dakota, the Commission and the court of appeals appear to have treated the "intrastate" sales as a unit, presumably because the volumes supplied thereunder were delivered to the pipeline as a single stream of gas emanating from a single extraction plant and jointly owned by the two producers.[28] Thus, in *North Dakota*, as in *California* and *Hastings*, it was possible to identify with certainty the source of the gas actually used for the restricted non-jurisdictional purpose (intrastate resale), and also to determine how much of the total volume sold at Tioga was used by Montana-Dakota

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Eighth Circuit, which rejected the distinction proposed here and relied largely upon the reasoning of the decision below. *Amerada Petroleum Corporation, et al.* v. *FPC*, C.A. 8, Nos. 17445 and 17492, decided July 15, 1964. The Eighth Circuit's decision is essentially indistinguishable from the decision below, and the government contemplates the filing of a petition for certiorari in that case.

[28] The examiner, whose decision was adopted by the Commission, found that the "gas sold under the instant 16 cents contracts is admittedly produced and consumed wholly within the State of North Dakota * * *" (16 FPC at 408-409). This finding, which purports to describe the actual facts, is consistent only with treating the contracts as sales of jointly owned gas.

We note, however, that the Eighth Circuit in *Amerada Petroleum Corp., et al.* v. *Federal Power Commission*, C.A. 8, Nos. 17445 and 17492, decided July 15, 1964, disagrees with our view that the gas sold there was from a single source, stating (Slip Op. p. 12):

"* * * all of the gas sold under the former contracts which traveled in this branch of the pipeline did not originate from one source. Signal had no oil or gas fields of its own, but obtained its gas from other producers. Contrastingly, Amerada had its own areas of production. The Tioga plant represented a single distillation station of these combined sources of oil-well gas production, not a solitary source in the literal sense making physical identification of the intrastate gas any easier from the interstate gas. * * *"

for intrastate and how much for interstate resale.[29] In the case of Houston, this cannot be done.

It is also relevant to point out that the undesirable regulatory consequences (discussed *supra*, pp. 23-25) which would flow from the decision below were not similarly threatened in the *Hastings* and *North Dakota* situations. A pipeline which obtains all its gas from a single supplier is not ordinarily in a position to discriminate among its customers by arbitrary representations that the gas delivered to a particular customer has a particular origin. Nor (by definition) in the single-source situation would there be any opportunity for preferential treatment of favored suppliers, the vice conspicuously present in the instant case. Moreover, in the case of a sale to an interstate pipeline for resale

[29] It should be noted that the Commission in its recent decision in *Montana-Dakota Utilities Company*, 30 FPC 200 (see fn. 27, *supra*), indicated its belief that *North Dakota* was wrongly decided even on its own facts, since the decision "failed to take appropriate account of the fact that the gas as sold and delivered into MDU's pipeline by Amerada and Signal cannot be identified as gas for interstate use or gas for intrastate use, but constitutes a commingled and indistinguishable flow through an integrated interstate pipeline system in interstate commerce. * * *" The Commission has had no occasion to express its view as to the correctness of the *Hastings* decision. We note that in the *California* case this Court stated that the problem of whether a sale is "in interstate commerce" (the issue in *North Dakota*) is different from the problem of whether a sale is a "sale for resale" (the issue in *Hastings*); the Court implied that while separate rates, contracts, negotiations, or regulation might perhaps be enough to divide an admittedly interstate transaction into a sale for resale and a sale for consumption only, these elements might not suffice to divide a transaction into separate interstate and intrastate components (345 U.S. at 317). Accordingly, the Eighth Circuit's reliance upon *California* in *North Dakota* appears misplaced.

within the same State (as in *North Dakota*), the absence of federal jurisdiction would not inevitably permit the transaction to go entirely unregulated, since the State in question would have a strong interest in regulating the sale for the protection of its own resident consumers. (See *supra*, p. 24). To be sure, there remains the probability, even in the single-source situation, that a sale to a pipeline for its own system use will not be regulated by the State of sale—except, perhaps, where a substantial number of the ultimate consumers whose rates would be affected are residents of that State. (See, *supra*, p. 24). It should be noted, however, that in *Hastings* itself, the ultimate consumers *were* residents of Nebraska, the State of sale. In addition, since the restricted-use sale in *Hastings* was not to an interstate pipeline, but to a local utility for electric-generating purposes, there was no likelihood that the fuel price would be reflected in the rates of natural gas consumers (see, *supra*, p. 21, fn. 21). In sum, the practical considerations which add force to the legal argument for federal jurisdiction in the present case were very largely absent in *Hastings* and *North Dakota*.

If, notwithstanding these differences in factual circumstances and threatened consequences, it should be concluded that the logic of this Court's decisions concerning federal jurisdiction over commingled energy casts doubt upon the holdings in *Hastings* and *North Dakota*, the answer is not that which respondents would draw; that the decision below is a permissible one. The answer, rather, is that the force of this Court's decisions remains unimpaired and that the principles on which the decisions rest should be applied consistently.

CONCLUSION

The judgment of the court of appeals should be reversed with directions to affirm the Commission's order.

Respectfully submitted.

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AUGUST 1964.

Office-Supreme Court, U.S.
FILED
SEP 18 1964
JOHN F. DAVIS, CLERK

No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1964

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Brief for Petitioners

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit (R. 365-376), issued September 24, 1963, are reported at 323 F.2d 190 (5th Cir., 1963). The Federal Power Commission's Opinion and Order Determining Jurisdiction (R. 254-277), issued October 23, 1961, is reported at 26 FPC 606 (1961), and the Federal Power Commission's Order Denying Rehearing (R. 332-334), issued December 12, 1961, is reported at 26 FPC 840 (1961). The

initial decision of the Presiding Examiner (R. 204-257), issued August 11, 1961, is reported at 26 FPC 617 (1961).

JURISDICTION

The judgment of the Court of Appeals setting aside the Federal Power Commission's orders was entered on September 24, 1963. (R. 377). The People of the State of California and the Public Utilities Commission of the State of California (California) filed a timely petition for rehearing on October 14, 1963 (378-379), which petition was denied by order of the court (R. 379) issued December 17, 1963. A petition for a writ of certiorari was filed on March 31, 1964, and was granted on June 1, 1964. (R. 380).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Section 19(b) of the Natural Gas Act.[1]

QUESTION PRESENTED

The question is whether an interstate stream of natural gas, destined for resale in interstate commerce and subject to the regulatory authority of the Federal Power Commission, may be contractually segregated so as to make a portion of that stream appear to be nonjurisdictional, and by this fiction remove such portion from said regulatory authority.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821-833, 15 U.S.C. §§ 717-717w) are set out in the Appendix to this Brief.

STATEMENT

This proceeding involves the jurisdiction of the Federal Power Commission (Commission), under the Natural Gas Act, over separate sales of natural gas by Lo-Vaca Gathering Company

1. 52 Stat. 831, 15 U.S.C. § 717r(b).

(Lo-Vaca) and Houston Pipe Line Company (Houston) to El Paso Natural Gas Company (El Paso). The Commission found that Lo-Vaca and Houston were engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and that they were natural gas companies within the meaning of the Natural Gas Act, and that their respective sales to El Paso were subject to the Commission's jurisdiction. (R. 273). The court below, in vacating the Commission's determination, found that Lo-Vaca and Houston had "carefully tailored their transactions" so as to place the sales beyond the Commission's regulatory powers. (R. 368).

El Paso is one of the major interstate pipeline companies of the nation, and is a natural gas company within the meaning of Section 2(6) of the Natural Gas Act.[2] (R. 3). El Paso is the principal supplier of natural gas to the California market. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 658-659, fn 5 (1963). Approximately 80 per cent of El Paso's natural gas sales are made at the California border and this gas is ultimately consumed by millions of household and industrial consumers within California.

The most significant fact in this proceeding is that gas sold by Lo-Vaca and Houston will, through El Paso's facilities, reach California and will be consumed within California. (R. 56-57, 66). Consequently, California, as the consuming state, will be most seriously affected if this flow of gas to the California market is exempted from regulation.

A. The Lo-Vaca Sale.

Lo-Vaca is a corporation organized and existing under the laws of the State of Texas, and having its principal place of business in the City of Corpus Christi, Texas. (R. 121).

2. 52 Stat. 821, 15 U.S.C. § 717a(6). Appendix, p. 2.

On March 15, 1960, Lo-Vaca entered into a contract with El Paso whereby it would sell 50,000 Mcf per day of natural gas to El Paso at an initial price of 22 cents per Mcf, with periodic escalations during the 20 year term of the contract up to 26 cents. (R. 129, 142, 146). The gas will be required to meet specific quality standards set forth in the contract. (R. 136-137).

The March contract contains a so-called "restricted use" clause. The clause provides as follows:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system." (R. 149).

The contract also contains the following provision:

> "It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale. * * *." (R. 142).

On May 16, 1960, Lo-Vaca and El Paso entered into a second contract which was identical to the first contract respecting quantity,[3] price and quality. (R. 153-177). However, this second contract did not contain a "restricted use" provision. Consequently, the May contract is involved in this proceeding only in so far as it covers an additional supply of natural gas which will be delivered to El Paso by Lo-Vaca simultaneously with the gas sold under the March "restricted use" contract. (R. 37, 122-123). Both contracts are the products of overlapping negotiations between the parties. (R. 58).

The Lo-Vaca gas, under both contracts, will be produced in the Gulf Coast area of the State of Texas and will be sold to

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3. This contract was amended on December 20, 1960, so as to change the estimated daily volume from 50,000 Mcf to 80,000 Mcf. (R. 360-362).

Lo-Vaca by four producers. (R. 123, 177). This gas will be delivered to El Paso Gas Supply Company (Supply Company), a wholly owned subsidiary of El Paso, at a point near Three Rivers, Live Oak County, Texas, to be known as Coquat Station.[4] (R. 24-25, 35-36, 46, 137, 161-162). Supply Company will receive the gas from Lo-Vaca for the account of El Paso with title and responsibility for the gas passing to El Paso. (R. 61, 123, 137, 162).

Both contracts provide that El Paso, at its own cost and expense, will install, maintain and operate at Coquat Station meters for measuring the quantity of gas delivered. (R. 138, 162). There are no definite plans for separately metering the volumes to be assigned to the "restricted use" contract and the volumes to be assigned to the other contract. (R. 59-60). The total Lo-Vaca supply, however, will be metered separately from a supply of gas to be delivered at Coquat Station by Houston (R. 60, 75-112).

The contracts provide that the determination of whether the gas delivered by Lo-Vaca conforms with the quality specifications will be made in accordance with generally accepted procedures of the industry. (R. 136, 161).

The physical identity of the Lo-Vaca gas under both the March and May contracts is lost when it is commingled at Coquat Station with gas received by El Paso from Houston. (R. 60). Moreover, there is no contractual or physical impediment to prevent gas from other sources from entering Coquat Station and being commingled therein. (R. 60).

All of the gas from Coquat Station, with the exception of some that will be consumed as compressor fuel, will be transported in a commingled stream to El Paso's Sonora facilities in Sutton County, Texas. (R. 60-61, 335). At Sonora the commingled stream

4. In a separate matter still pending before the Commission, *El Paso Gas Supply Co.*, FPC Dkt. No. CP60-101, Supply Company seeks authority to construct a compressor unit, called Coquat Station, at this delivery point, and to build a 227 mile pipeline from Coquat Station to a point of connection with El Paso's system at Sonora, Sutton County, Texas. (R. 35).

will enter El Paso's vast and intricate pipeline network which extends from Texas to the California border. (R. 335). Beyond Sonora natural gas from countless other sources also enters this giant system. (R. 61, 68-71, 358-359). Through this system Lo-Vaca gas will reach California. (R. 55).

B. The Houston Sale.

Houston is a corporation organized and existing under the laws of the State of Texas, having its principal place of business in the City of Houston, Texas. (R. 180).

On July 19, 1960, Houston contracted to sell to El Paso 70,000 Mcf per day of natural gas. (R. 75-112). The contract has a term of 20 years and the price, computed on Houston's cost of service, will initially approximate 19.5 cents per Mcf. (R. 94-97, 99). The gas to be delivered under the contract will be subject to various quality limitations. (R. 89, 93).

The Houston-El Paso contract contains the following "restrictive use" provision.

> "It is recognized that the construction by El Paso of a separate network of service pipe lines running to the various components of El Paso's plant located in Texas for delivery of gas for fuel purposes would be unnecessary duplication of facilities and economically prohibitive. Accordingly, it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. El Paso shall advise Houston as to each such utilization to be made of the gas purchased hereunder, and no new or different utilization of such gas shall be made by El Paso without the prior written consent of Houston. El Paso further covenants and agrees that at no

time during the term of this agreement will El Paso take from Houston a quantity of gas in excess of the quantity of gas being consumed at the same time in Texas by El Paso for uses agreed to hereunder by Houston. If, by inadvertence or mistake or for any other reason, El Paso shall at any time during the term hereof take from Houston hereunder a greater quantity of gas than is being so utilized, El Paso covenants that the same shall be sold or utilized by El Paso solely in intrastate commerce for use and consumption within the State of Texas." (R. 78-79).

Houston's gas will be produced in the State of Texas and will be supplied by Houston's own system. (R. 28, 50). It will be delivered to Supply Company, for El Paso's account, at Coquat Station. (R. 59, 82-83). The gas will be metered separately from the Lo-Vaca gas, or any other gas, being received at Coquat Station. (R. 59-61). The meters, at the point of delivery, will be installed, operated and maintained by Houston. (R. 83). El Paso will have the option, at its cost and expense, to provide a check meter. (R. 83). Provision for the measurement of heating content is specifically provided in the contract. (R. 93).

Title to the gas will pass to El Paso at Coquat Station. (R. 83). The Houston gas will there be commingled with the total supply of Lo-Vaca gas. (R. 36, 60). The commingled stream will proceed to Sonora and from there into El Paso's system. (R. 36, 55-57, 60-66).

The actual identity of the Houston gas will be lost when it is physically commingled with Lo-Vaca's gas at Coquat Station. (R. 60-61). Under the contract, however, El Paso will pretend that the Houston gas is being consumed in certain of its existing and proposed plants—all within the State of Texas. (R. 36-37). In these Texas plants El Paso will utilize, or will sell to Phillips Petroleum Company (Phillips) for utilization, volumes of natural gas from its system which are equal to or in excess of the volumes of gas purchased from Houston. (R. 68, 78-79). El Paso will operate at

these plants the meters necessary to prove that the consumption of system gas within Texas is equal to or greater than the volume of Houston gas entering the system. (R. 79).

El Paso has assured Houston that it is physically possible that some gas from the commingled stream leaving Coquat Station will flow to each of the designated plants and that, moreover, El Paso is prepared to realign its facilities to achieve such a flow.[5] (R. 34-35). This flow of system gas, as supplemented by the gas from Coquat Station, will be considered by El Paso as replacing the system gas now being consumed by existing plants. (R. 42, 344-345) In proposed plants El Paso will also indulge in the fiction that the system gas which will be burned therein will be Houston's gas.

C. Proceedings Before the Commission.

Pursuant to Section 7 of the Natural Gas Act,[6] Lo-Vaca, on June 1, 1960, applied to the Commission for a certificate of public convenience and necessity to gather and deliver natural gas under its March "restricted use" contract and to gather and sell natural gas under its May unrestricted contract. (R. 122).

On December 27, 1960, Houston filed a petition for a declaratory order under Section 16 of the Act[7] to remove uncertainty as to the jurisdiction of the Commission over its sale to El Paso and for a declaration by the Commission that it will have no jurisdiction over such sale because the sale will be wholly in intrastate commerce. (R. 179-192, 256).

5 In *El Paso Natural Gas Co.*, FPC Dkt. No. CP61-26, El Paso is seeking authority to construct certain facilities to transport volumes of its system gas to some of the plants where the Houston gas will supposedly be consumed (R. 38-39, 48-49). Other facilities for the same purpose were the subjects of applications in FPC Dkt. Nos. G-15696 and G-18616, which applications have been withdrawn by El Paso. (R. 49).

6 52 Stat. 824, 15 U.S.C. § 717f. Appendix, p. 3.

7 52 Stat. 830, 15 U.S.C. § 717o. Appendix, p. 6.

The Commission, on February 24, 1961, consolidated for hearing Lo-Vaca's application and Houston's petition for the limited purpose of resolving the questions of jurisdiction raised by the "restricted use" provisions. (R. 201-203). California intervened in the proceeding. (R. 197-200). Also intervening were three California distributing utilities, namely, Southern California Gas Company, Southern Counties Gas Company of California, and Pacific Gas and Electric Company. Transwestern Pipeline Company, another interstate pipeline company serving the California market, also intervened. Hearings were conducted before a presiding examiner on March 21-22, 1961, and April 10, 1961. (R. 19-71, 337-360).

D. The Presiding Examiner's Decision.

The initial decision of the presiding examiner was issued on August 11, 1961. (R. 204-237). The examiner held (1) that the Lo-Vaca sale to El Paso, under the "restricted use" contract, would be a sale of natural gas for resale in interstate commerce and would be subject to the Commission's jurisdiction, and (2) that the Houston sale would not be a sale of natural gas for resale in interstate commerce and, consequently, would be beyond the reach of the Commission's authority. Lo-Vaca's May unrestricted contract was held, as Lo-Vaca and El Paso had conceded, to be jurisdictional. (R. 216).

The examiner found that the Lo-Vaca and Houston gas would be physically commingled in El Paso's interstate transmission system, and that some part of the gas "inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California * * *." (R. 210-211). The only "segregation" of the gas, the examiner found, would be by contract language.

In Lo-Vaca's case the examiner concluded that, in view of the commingling, some or all of Lo-Vaca's gas would in fact be resold

in interstate commerce, and that Lo-Vaca and El Paso could not remove the sale from the Commission's jurisdiction by agreeing that El Paso consume in its own facilities outside of Texas an amount of gas at least equal to the amount purchased from Lo-Vaca. (R. 226-235).

In Houston's case the examiner concluded that the gas would be produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas. Because the Houston gas would not be commingled with any gas from outside of the state, but would move with Texas produced gas only, the examiner found that interstate commerce would not be involved. (R. 224-226).

California, among others, filed exceptions to the examiner's decision. California's exceptions were directed to the examiner's failure to find that the Houston sale was also subject to the Commission's jurisdiction. (R. 238-253).

E. The Commission's Opinion.

On October 23, 1961, the Commission issued its Opinion No. 348 (R. 254-277) reversing that part of the examiner's initial decision pertaining to the Houston sale, and finding jurisdiction over Houston as well as over Lo-Vaca.

The Commission stated that the question presented was "whether contractual arrangements and the intentions of the parties can segregate Lo-Vaca's and Houston's gas sold to El Paso from other gas received by El Paso regardless of physical commingling, the actual destination of the gas, and the operations of El Paso's system." (R. 262). In answering this question in the negative, the Commission found that the Lo-Vaca and Houston gas would actually, in part at least, be resold to customers outside the State of Texas inasmuch as it would be physically impossible to restrict the use of this gas to certain facilities as was the intention of the contracting parties. The Commission held both sales to be sales in interstate

commerce for resale within the meaning of Section 1(b) of the Natural Gas Act.[8]

The Commission first considered the reality of the commerce involved:

> "It is the 'nature of the beast' not the label that is controlling. It has been held that whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract." (R. 266).

The facts, as viewed by the Commission, demonstrated that the character of the Lo-Vaca and Houston sales was indeed essentially interstate commerce:

> "El Paso is engaged in an enterprise extending from Texas to California and from Mexico to Canada. The record in this case shows that its gas produced or purchased in Texas goes to a number of possible destinations. Some is consumed in Texas, but most of it is transported out of the state in El Paso's pipeline system to be consumed in pipeline facilities or resold in New Mexico, Arizona or California. The contractual provisions, of course, do not alter these physical facts. Neither is the situation altered by El Paso's proposal to build a 16-inch line west from its Keystone compressor station so that there would be a line wholly in Texas by which fuel could reach its Texas compressor stations, for the Houston gas commingled with other gas in El Paso's main line would physically move out of Texas although some portion might travel through the proposed 16-inch line.
>
> "The way in which El Paso operates its system in transporting its gas from the sources of supply to the points where it is needed as discussed in part above, demonstrates that the system must be considered as a whole and that it has the primary purpose of moving gas from the Permian Basin and other sources to consumers in a number of states." (R. 267-268).

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8. 52 Stat. 821, 15 U.S.C. § 717(b). Appendix, p. 1.

The Commission concluded that a sale of gas to El Paso's interstate system, to be used for system purposes and in part to be sold for resale outside the State of Texas, was within its jurisdictional authority. The Commission added: "The gas to be sold to El Paso by Lo-Vaca and Houston would be isolated only by terms of the contracts but actually would become system gas along with gas of other producers who did not receive this contractual treatment." (R. 268).

The Commission held "that a sale of gas in interstate commerce for resale cannot be transmuted into something else by contractual provisions." (R. 272).

One Commissioner dissented respecting the Houston sale. (R. 274-277).

F. Proceeding in the Court of Appeals.

On February 6, 1962, Lo-Vaca, Houston and El Paso filed in the United States Court of Appeals for the Fifth Circuit a joint petition to review the Commission's decision. (R. 1-18). California and Southern California Gas Company and Southern Counties Gas Company of California (Southern California Companies) were granted leave to intervene in support of the Commission in the court proceeding.

1. The Majority Opinion.

On September 24, 1963, the court issued its decision which vacated the order of the Commission under review. (R. 365-372). The court relied upon *United States v. Public Utilities Commission*, 345 U.S. 295, 318 (1953), wherein this Court, in considering whether a distinction for jurisdictional purposes could be made between a part of a sale of electric energy in California which would be used by the purchaser for its own industrial needs in Nevada and a part of the same sale of electric energy which would be resold by the purchaser to others in Nevada, stated that

such separability would turn on whether "an essentially separate transaction covering the power directly consumed by the purchaser is identifiable." The Fifth Circuit found that Lo-Vaca, Houston and El Paso "carefully tailored their transactions to fit the above *caveat*." (R. 368).

The majority of the court, in vacating the Commission's decision, relied also upon *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954), cert. denied, 349 U.S. 920 (1955), and *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957). The *City of Hastings* case, the court held, stood for the proposition that a direct sale of natural gas in interstate commerce to a city for plant fuel, even if commingled with gas also sold to the city for resale, is nonjurisdictional if the sale were covered by a separate rate and contract. (R. 368-369). The *North Dakota* case, the court stated, affirmed a finding of nonjurisdiction over gas produced and consumed in the State of North Dakota but commingled for transmission purposes with gas moving in interstate commerce. (R. 369-370).

The Commission's decision, the court continued, "ignores the nature of natural gas." (R. 370). The court explained:

> "Must petitioners [Lo-Vaca, Houston, and El Paso] be driven to the unnecessary expense of constructing a parallel line to carry the 'non-jurisdictional' gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation." (R. 371, fn 6).

In concluding, the court considered the argument advanced by the California intervenors that the Commission must protect consumers against unregulated costs for jurisdictional services affect-

ing interstate commerce. The Court said that such a plea must be made to Congress and not to the judiciary. (R. 371).

2. The Dissenting Opinion.

In his dissenting opinion Judge Rives urged that jurisdiction should not turn on contract clauses that do not correspond and are not intended to correspond to reality. (R. 376). Whether gas is transported in interstate commerce or sold in interstate commerce for resale depends, according to the dissenting opinion, "not on what the parties say about the transaction but on what is done with the gas." (R. 376).

Relying upon this Court's opinion in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515, 529 (1945), the dissenting opinion stated: " 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.' " (R. 376). Likewise, according to the approach of the dissenting judge, federal jurisdiction was to follow the flow of natural gas.

3. Petitions for Rehearing.

Petitions for rehearing of the court's decision were filed by California, the Commission and the Southern California Companies. The petitions were denied by order of the court, without opinion, dated December 17, 1963. (R. 379).

SUMMARY OF ARGUMENT

Lo-Vaca and Houston are engaged in the business of supplying natural gas to El Paso, an interstate pipeline company whose principal business, in turn, is supplying natural gas to the California market. These parties, by contractual intention without physical implementation, seek to direct a portion of an interstate stream of natural gas, destined for resale in an interstate market, to non-jurisdictional utilization. Under so-called "restricted use" provi-

sions in their contracts gas sold by Houston to El Paso will be considered *as if* it were consumed within the borders of the producing state, and gas sold by Lo-Vaca will be considered *as if* it were sold to El Paso for its own general use outside of the producing state. Placing contractual stipulations aside, the gas will actually flow in interstate commerce for resale in interstate commerce.

The Commission has jurisdiction over all sales of natural gas for resale in interstate commerce. The foundation for this jurisdiction is the fact of physical flow. Thus, contractual language purporting to restrict the flow is immaterial and inconsequential when the physical arrangements of the contracting parties, in compliance with the contract, do not restrict the flow at all.

Commission jurisdiction is based upon what is done with the gas in the context of a comprehensive regulatory scheme, and this jurisdiction cannot be subverted by fiction. Allowing the Lo-Vaca and Houston sales to escape regulation will open an "attractive gap" in the regulatory scheme envisioned by Congress. To permit this gap to remain open on the basis of mere agreements, divorced from fact, which pretend to move gas in a manner in which it cannot be moved, will produce regulatory chaos.

The interests of primary concern here are national rather than local. This Court must decide the case in the manner which will best promote the congressional policy directed towards effective regulation in the public interest. Such congressional policy, embodied in the Natural Gas Act, does not countenance "attractive gaps" in the comprehensive regulatory scheme created by the Act.

Argument

I.

THE COMMISSION HAS JURISDICTION OVER THE HOUSTON AND LO-VACA SALES FOR THE REASON THAT THE GAS SOLD WILL ACTUALLY FLOW IN INTERSTATE COMMERCE AND WILL BE SOLD FOR RESALE IN INTERSTATE COMMERCE.

A. The Commission Has Jurisdiction Over All Sales of Natural Gas for Resale in Interstate Commerce.

Some of the early attempts by the states to regulate the natural gas industry failed because the states' regulatory powers were unlawfully extended into the domain of interstate commerce. *State Corporation Commission of Kansas v. Wichita Gas Co.*, 290 U.S. 561, 563-564 (1934); *Missouri v. Kansas Gas Co.*, 265 U.S. 298, 307-308 (1924). As a result a regulatory void existed which Congress filled with the passage of the Natural Gas Act in 1938.

Section 1(b) of the Natural Gas Act provides as follows:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

This statute imposed federal jurisdiction over *all* sales of natural gas for resale in interstate commerce. This was a jurisdictional grant in an area which was beyond the reach of the regulatory power of any individual state. See *Public Utilities Commission v. Attleshoro Steam & Electric Co.*, 273 U.S. 83, 90 (1927).

The case at bar represents the elaborate efforts of two companies, aided by a third, to sell their gas within this area of exclusive federal jurisdiction unimpeded by the exercise of federal authority.

This is not a case presenting a contest between federal and state agencies as to which agency, federal or state, shall regulate a particular sale of gas. The question here is whether Houston and Lo-Vaca, assisted by El Paso, can succeed in removing their gas from the jurisdictional embrace of Section 1(b).

Section 1(b) encompasses all sales for resale in interstate commerce for ultimate public consumption. There are no exceptions. As this Court said in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 517 (1947):

> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise."

If Lo-Vaca's and Houston's gas is sold for resale in interstate commerce, which California contends is a fact, then federal jurisdiction is required. No special exemption is available to Lo-Vaca and Houston which would enable them to escape federal regulation and still sell their gas for resale in interstate commerce.

By contractual language Lo-Vaca attempts to characterize its "restricted use" sale as a direct, industrial sale to El Paso. Houston, in the same manner, characterizes its sale as one made in intrastate commerce. Thus, by such characterizations, they expect to place themselves and their sales within the exclusionary provisions of Section 1(b).[9] In *Interstate Natural Gas Co. v. Federal Power Commission*, 156 F.2d 949, 951 (5th Cir. 1946), affirmed, 331 U.S. 682 (1947), the court rejected a similar attempt to escape regulation where the petitioner therein characterized certain sales so as to bring them within a statutory exception. The court stated:

> "We think petitioner's difficulties in construction and interpretation arise out of the fact that, treating unlike things as

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9. The provisions of the Natural Gas Act "shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

alike, it tries to read the exception with respect to production or gathering as an exception with respect to sales. There is no warrant in the act for so doing. It is very simply and plainly written. After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction, *a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out.* No conflict with them will, therefore, be found unless the conflict is clear and inescapable and then only in the precise point of the conflict." (Emphasis supplied).

The principal purpose and the positive provision of the Natural Gas Act is that federal jurisdiction shall govern sales for resale in interstate commerce. If parties are enabled to defeat this principal purpose and positive provision by mere words, then effective regulation under the Natural Gas Act cannot be achieved.

B. Lo-Vaca's and Houston's Gas Will Be Physically Sold for Resale in Interstate Commerce.

The record demonstrates that the Lo-Vaca and Houston transactions will result in sales for resale in interstate commerce, and that both transactions fall into the category of sales which are subject to the Commission's regulatory power.

Contractual language purporting to restrict the gas is misleading. The Lo-Vaca and Houston gas is not restricted in any sense of the word. The restrictions are placed upon El Paso, as purchaser, and relate to the utilization of the gas. The proposed flow of the gas shows that the gas will not be utilized for nonjurisdictional purposes but will be physically transported in interstate commerce for resale in interstate commerce by El Paso.

At the outset Lo-Vaca's "restricted use" supply will be commingled with another supply of gas, also from Lo-Vaca, which will be subject to the Commission's jurisdiction. (R. 22, 37, 59-60, 122-123). The total Lo-Vaca supply will then be commingled with the

Houston supply. (R. 59-60). The point of commingling is El Paso's proposed Coquat Station. (R. 60).

Some gas will be consumed as fuel in the Coquat Station compressors. (R. 61). The remainder, under pipeline pressure, will be transmitted to El Paso's existing plant at Sonora. There the gas enters El Paso's system. (R. 61). Beyond Sonora, the gas mixes with gas from other sources joining the Sonora line. (R. 61-62). At Benedum Junction in Upton County, Texas, the line divides. (R. 335). One segment of the commingled stream flows through a vast system of pipes, valves and compressors to Plains, Texas, where it joins El Paso's northern mainline which carries gas to the California border. (R. 335). The other segment flows through another complex network, reaches El Paso's southern mainline, and arrives at the California border. (R. 335).

Lo-Vaca, Houston and El Paso concede that the commingled stream which originates at Coquat Station will flow to California, and concede they must, for there will be no attempt to physically prevent the Lo-Vaca and Houston supplies from being resold in interstate commerce. (R. 55).

The court below recognized the physical reality of the gas flow. The court said:

> "[The Commission] urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is * * *". (R. 367).

The undisputed physical fact that Houston's and Lo-Vaca's gas will be resold in interstate commerce is the statutory base upon which the Commission's jurisdiction rests. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942). Other considerations are immaterial and inconsequential.

C. The Physical Flow of Gas in Interstate Commerce for Resale Is the Foundation for the Commission's Jurisdiction.

In a line of cases involving natural gas energy and electric energy, this Court's jurisdictional decisions have been based upon the fact of flow. *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 467 (1950); *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 629-631 (1945); *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 687-688 (1947); *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U.S. 61, 68-72 (1943); *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 503-504 (1942).

In *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 209, fn 5 (1964), this Court stated:

> "'[F]ederal jurisdiction was to follow the flow of electric energy, *an engineering and scientific, rather than a legalistic or governmental, test.' Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515, 529."

The fact of flow cannot be changed by contractual provisions respecting the disposition of the gas. The Commission stated in its decision below that it "is the 'nature of the beast' not the label that is controlling." (R. 266).

D. Labels Cannot Alter the Physical Flow of Gas.

El Paso is presently utilizing its system gas for fuel to operate facilities and plants both inside and outside of Texas. In these existing facilities and plants only the label of the gas now being burned as fuel will be changed by the Houston and Lo-Vaca transactions. (R. 36-37, 358-359). Gas presently being consumed as fuel in Texas, or resold to Phillips in Texas, will be labeled "Houston gas"; gas presently being burned as fuel in El Paso's compressors outside of Texas will be called "Lo-Vaca gas".

El Paso's ability to use part of its total supply of system gas to satisfy its own need for compressor fuel or to sell part of its supply to others in intrastate commerce is not questioned. Nor is it questioned that the volumes so consumed will at least equal the volumes received from Lo-Vaca and Houston. However, the gas so consumed will not necessarily be Houston's gas or Lo-Vaca's gas. It might be anybody's gas or everybody's gas. It might be gas under old contracts, new contracts or future contracts. It might even be gas presently subject to the Commission's jurisdiction.

El Paso's agreements with Lo-Vaca and Houston, which attempt to segregate by label gas which physically flows in interstate commerce and which is sold for resale, change nothing. Likewise, intricate metering by El Paso, which assures that the volumes of gas consumed in compressors, treating plants, boilers and other facilities throughout Texas, New Mexico and Arizona at least equal the volumes purchased from Lo-Vaca and Houston, changes nothing. The mechanical operation of meters, at points where El Paso's interstate stream is tapped, cannot decide, for all purposes, which gas is subject to the Commission's jurisdiction and which is not. The Court stated, in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 512 (1947), that "mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement and resulting sales we have here." Mechanical metering devices cannot change gas, which in the pipeline is destined for interstate commerce, into a commodity in intrastate commerce; nor can they change gas, otherwise directed for resale in other states, into a direct sale not subject to regulation.

E. Contractual Segregation of Houston's or Lo-Vaca's Gas Is Not Possible.

The court below held that El Paso could indeed contractually segregate "Houston gas" and "Lo-Vaca gas." The court said: "Gas in a pipeline can be separated only 'on paper' or conceptually, or, at least, this is the cheapest and most practical way to do it." (R. 370-371). The court principally relied upon *United States v. Public Utilities Commission*, 345 U.S. 295 (1953); *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954), cert. denied, 349 U.S. 920 (1955), and *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957). Under the facts of the case at bar, only the *Public Utilities Commission* case has application—but not for the reasons advanced by the court.

1. United States v. Public Utilities Commission.

This case, relied upon by the court below, resulted in a finding of Commission jurisdiction—a different result from that reached in the decision below. The conflict in the *Public Utilities Commission* case was between state regulation or federal regulation. California Electric Power Company agreed to sell electric energy to the Navy Department in California. Part of the energy was to be directly consumed by the Navy in Nevada; the remainder was to be resold by the Navy to military dependents in Nevada. The California Public Utilities Commission asserted jurisdiction over at least that portion of the sale that was to be directly consumed and not resold. *California Electric Power Co.*, 50 Cal. P.U.C. 749, 754-759 (1951). This Court, in finding that federal jurisdiction attached, observed that the portions could not be separated because there was "no record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies * * *." 345 U.S. at 318.

The court below construed the *Public Utilities Commission* case to the effect that if California Electric Power Company and

the Navy had provided for separate sales, the energy could have been divided for jurisdictional purposes. The court concluded that Houston and Lo-Vaca had "carefully tailored their transactions to fit the above *cat eat*." (R. 368).

Houston and Lo-Vaca did identify their sales by separate rates and separate contracts. But they did not bring their sales within any *"cat eat"* of the *Public Utilities Commission* case. The electric energy involved in that case and sold to the Navy was delivered to the Navy as a 55,000 volt load in California. The Navy transmitted the energy into Nevada over its own line where it consumed part in official industrial operations and resold the remainder, between 15% and 29% of the total, to its military dependents in Nevada. This Court, while not deciding the issue, stated that if California Electric Power Company and the Navy had had separate transactions relating to the separate uses, then it might have been possible to fix the limits of federal jurisdiction. 345 U.S. at 317-318. But the record would not permit such a finding. 345 U.S. at 318.

If Houston and Lo-Vaca, by separate contracts, were to sell a total of 120,000 Mcf per day of the same quality of natural gas to El Paso, and El Paso were to consume 70,000 Mcf of the commingled Houston-Lo-Vaca stream within Texas, and were to transport the remaining 50,000 Mcf of that commingled stream for its own use as compressor fuel outside of Texas, all without any possibility of commingling supplies of natural gas from any other supplier, then it might be argued that the parties had "carefully tailored" their contracts to fit the facts of the *Public Utilities Commission* case. However, the Houston and Lo-Vaca "restricted use" gas will be commingled at the very outset in Coquat Station with Lo-Vaca's unrestricted gas. Thereafter, the total supply leaving Coquat Station will be further commingled with gas purchased from numerous other suppliers in Texas and New Mexico. (R. 343-359).

Unlike the situation in the *Public Utilities Commission* case, where the total supply of electric energy sold to the Navy and generated in California was isolated in the Navy's line and the proportion of the total assigned to each use could be determined, the Houston and Lo-Vaca "restricted use" gas will not be isolated in any pipeline, system or facility of El Paso, inasmuch as this gas is commingled with Lo-Vaca's unrestricted gas at the outset—at the point of delivery to El Paso at Coquat Station. In order to achieve contractual segregation, as suggested by the Court, it would be necessary to assume that the Houston and Lo-Vaca supplies were of the same quality and that they, in a commingled status, were somehow isolated in El Paso's system. Then, it would be possible to conceive that one portion of the commingled Houston-Lo-Vaca supply might be utilized for one purpose and the remaining portion utilized for another purpose.

If contractual segregation had been accomplished in the *Public Utilities Commission* case, the California Public Utilities Commission would have had jurisdiction over the sale in California to the Navy Department for its own use, and the Federal Power Commission would have had jurisdiction over the sale of energy resold by the Navy. In the case at bar, by contrast, contractual segregation will result in the sales of Houston and Lo-Vaca going unregulated.

The State of Texas has no conceivable interest in regulating the Houston and Lo-Vaca sales.[10] The parties to be most seriously affected by the sales reside in California, for the cost of the Houston and Lo-Vaca gas will be included within El Paso's cost of service upon which El Paso's rates, paid principally by consumers in California, will be based. Moreover, according to the

10. Whether the State of Texas would have the power to regulate these sales is also questionable. Since the gas involved will actually flow in interstate commerce and will be resold in interstate commerce, constitutional limitation under the Commerce Clause would appear to preclude an assertion of state jurisdiction. See *Public Utilities Commission v. Attlesboro Steam and Electric Co.*, 273 U.S. 83, 88-90 (1927).

attempted contractual segregation, the gas purchased will supply and operate facilities which will perform jurisdictional services for El Paso, such as compressing gas for transmission in interstate commerce. Furthermore, the Houston and Lo-Vaca supplies will be transported within a system which is essentially paid for through rates charged to the California consumers. The sales, then, are not peculiarly of local concern to Texas, or within the class with which Texas might appropriately deal in making reasonable provision for local needs. See *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, 30 (1920).

The *Public Utilities Commission* case has direct application to this proceeding because this Court, in holding that the total supply of energy was subject to federal regulation, looked at the actual flow of the energy. This Court said:

> "Certainly the concrete fact of resale of some portion of the electricity transmitted from a state to a point outside thereof invokes federal jurisdiction at the outset, despite the fact that the power thus used traveled along its interstate route 'commingled' with other power sold by the same seller and eventually directly consumed by the same purchaser—distributor * * *." 345 U.S. at 316.

2. City of Hastings v. Federal Power Commission.

City of Hastings v. Federal Power Commission, 221 F.2d 31 (D.C. Cir. 1954), cert. denied, 349 U.S. 920 (1955), is the case which the court below found "strikingly similar" to the Lo-Vaca proposal. (R. 368-369). This case arose upon complaint by the City of Hastings, Nebraska, against Kansas-Nebraska Natural Gas Company—an interstate pipeline company. The city received gas from the pipeline at city-gate delivery points. The city utilized part of the total supply received to generate electric energy and part for resale to local consumers. The pipeline company's tariff, on file with the Commission, specifically excluded the gas directly consumed by the city in its power plant. The city complained that

the total gas supply constituted one sale which was subject to the Commission's jurisdiction. The Commission found that the natural gas consumed in the power plant was a direct sale for the city's own use, and hence not within the jurisdictional grant of Section 1(b) of the Natural Gas Act. The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision.

City of Hastings involved an isolated supply of natural gas not unlike the isolated supply of electric energy sold in the *Public Utilities Commission* case. The purchasing city put the supply to two separate uses, each being distinguishable, and each serving as a basis for a separate transaction. By reference to the separate transactions the proportion of the total supply furnished could be ascertained as to use for each purpose.

Under the Lo-Vaca transaction it is impossible to segregate contractually Lo-Vaca's gas as to use. The total Lo-Vaca supply, a part of which is assigned to the March "restricted use" contract and a part of which is assigned to the May unrestricted contract, will be somewhere within El Paso's system, but no one will know precisely where. This supply cannot be separated as to use, nor can the gas sold under the March contract be separated as to use from all of the remaining gas in El Paso's system. The reason is that the Lo-Vaca gas, unlike the *City of Hastings* gas, cannot be traced from the point of delivery where it is received by the purchaser to the point of ultimate use. Under the Lo-Vaca proposal the physical reality of the fact of flow is ignored.

The denial of federal jurisdiction in the *City of Hastings* case apparently resulted in jurisdiction passing to the State of Nebraska. The court said:

> "[A] tap line from Kansas-Nebraska's interstate line to the power plant would have served the power plant fuel needs, and the State of Nebraska would have had 'full power under the act and the decisions to regulate such direct sales of natural gas for consumption within its borders.' Colorado In-

terstate Gas Co. v. Federal Power Commission, 3 Cir., 1950, 185 F.2d 357, 361. See also, Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 1951, 341 U.S. 329, 334, 71 S. Ct. 777, 95 L.Ed. 993." 221 F.2d at 33.

The denial of federal jurisdiction in the Lo-Vaca instance will result in no regulation. The States of California, New Mexico and Arizona cannot regulate a sale made in Texas. Nor could Arizona or New Mexico regulate the sale simply because the facilities slated to use the gas, under the contractual segregation hypothesis, are located in those states. Moreover, these facilities are subject to the Commission's jurisdiction.

Congress did not contemplate ineffective regulation at either the state or federal level, but rather a scheme of comprehensive regulation. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 520-521 (1947). The *City of Hastings* case is consistent with this congressional purpose. The Lo-Vaca proposal is to the contrary.

3. North Dakota v. Federal Power Commission.

North Dakota v. Federal Power Commission, 247 F.2d 173 (8th Cir. 1957), involved the sale of natural gas from the tailgate, or outlet, of an extraction plant in the State of North Dakota to Montana-Dakota Utilities Company, an interstate pipeline company. From the plant, located in the northwestern quarter of the state, the pipeline company constructed a pipeline traveling generally westward into the State of Montana. The pipeline company contracted with North Dakota producers supplying gas to the plant for a "firm" supply which would be transported in this western line and resold to several communities in North Dakota. The pipeline also contracted with the same producers for a supply of "dump", or surplus, volumes from the plant. The "dump" supply would be transported in the same line but, by contractual segregation, would be considered as crossing the border into

Montana for eventual resale. In effect, additional volumes in the line, not committed for North Dakota consumption, would be resold in interstate commerce.

The United States Court of Appeals for the Eighth Circuit upheld a decision of the Commission, attacked by the State of North Dakota and its Public Service Commission, that the "firm" supply was a separate transaction and was not a sale in interstate commerce.

The court below related the facts of the *North Dakota* case to Houston's proposal. (R. 369-370).

> The *North Dakota* case has no application under the facts of the case at bar. The "firm" supply and the "dump" supply involved in *North Dakota* consisted of residue gas from the tailgate of the plant. This was the only gas in the pipeline company's western line. As in the *City of Hastings* case, *supra*, the total supply lent itself to being proportionally separated at one point for one purpose, and at another point for another purpose. The contracts separated a measurable part of the whole for use in North Dakota and another measurable part for use outside of the state. This arrangement was also consistent with the *Public Utilities Commission* case, *supra*, where the Navy's entire supply of energy was capable of being segregated as to use.
>
> The *North Dakota* situation is not applicable to the Houston proposal. Houston's gas, commingled within El Paso's interstate system, is not capable of being segregated by El Paso for any specific use. There is no conceivable way of committing all or any portion of the Houston supply to performing a particular service.

The "firm" sale in *North Dakota* presented a proper case for local regulation. The petitioning parties were the State of North Dakota and its Public Service Commission, on behalf of local consumers. The court said:

> "While the court recognizes the petitioners' proper concern for the interests of North Dakota natural gas consumers in

the newly developing market area, the conclusion is inescapable that jurisdiction rests not with the FPC but with the petitioners themselves." 247 F.2d at 178.

The Houston sale, on the other hand, will go unregulated because California, with interests like those of the petitioners in *North Dakota*, is in this case powerless to act.

In *North Dakota* the utilization which was declared to be beyond federal regulatory powers concerned a sale for resale to ultimate consumers in the State of North Dakota. This sale, like the direct sale to the city's power plant in *City of Hastings*, can burden no other state except the state in which the sale is made. But the Houston sale, like the Lo-Vaca sale, requires that some gas be drawn out of El Paso's system and directed to compressor stations and other facilities which, whether located in Texas, or outside of Texas, make up parts of El Paso's integrated, interstate system. The customers of this system are burdened by the Houston sale, and their remedy rests upon a finding of Commission jurisdiction.

II.

COMMISSION JURISDICTION IS BASED UPON WHAT IS DONE WITH THE GAS IN THE CONTEXT OF A COMPREHENSIVE REGULATORY SCHEME AND CANNOT BE SUBVERTED BY FICTION.

A. Congress Intended a Comprehensive and Effective Regulatory Scheme.

This Court has consistently held that the purpose of the Natural Gas Act is "to create a comprehensive and effective regulatory scheme * * * to protect consumers against exploitation at the hands of natural-gas companies." *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 520 (1947). See also *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 685 (1954).

The comprehensive scheme was designed to permit federal regulation to supplement state regulation. *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 470-471 (1950); *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 517-519 (1947). The Natural Gas Act defines this federal authority in terms of transportation in interstate commerce and sales in interstate commerce for resale. This Court, in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961), noted, however, that these terms are frequently, standing alone, of little help in the solution of a borderline case. This Court, thus, laid down a "broader principle" to be utilized in deciding jurisdictional questions:

> "[I]n a borderline case where congressional authority is not explicit we must ask whether state authority can practically regulate a given area and, if we find it cannot, then we are impelled to decide that federal authority governs." 365 U.S. at 19.

This Court further stated that "Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource." 365 U.S. at 28.

The decision of the court below opens an "attractive gap" in the comprehensive and effective regulatory scheme. The court said:

> "We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional [Houston's and La Vaca's] gas. Their plea should be made, however, to Congress and not to us. The courts are not competent to make legislative decisions as to whether jurisdiction *should* be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the

statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them." (R. 371).

Thus, the consumers, in whose interest the Natural Gas Act was designed, are without an existing remedy and are left unprotected. Yet, rates and charges exacted by Houston and Lo-Vaca for their gas become fixed items of El Paso's cost of service which may be charged to the subsequent purchasers of the gas, including the ultimate consumers. When it is recalled that El Paso is a major interstate pipeline company whose every function affects numerous states, the approval by the court below of "restricted use" sales, which escape all regulation, is repugnant to the congressional plan.

B. The "Attractive Gap" Must Be Closed by the Recognition of Federal Jurisdiction Over the Houston and Lo-Vaca Sales.

Unlike the final result reached in *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D. C. Cir. 1954), cert. denied, 349 U.S. 920 (1955), and *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957), or the result adverted to in *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), the result in the case at bar is nonregulation. In the above-mentioned cases, relied upon by the court below, the denial of federal jurisdiction meant that North Dakota, Nebraska and California — the states where the sales were made—could exercise their own regulatory authority. The State of Texas, where the Houston and Lo-Vaca sales will be made, has no asserted or conceivable interest in regulating sales of natural gas the costs of which are to be borne by those outside of the state and principally by California consumers.

Where a regulatory problem oversteps the bounds of any one state and it is improbable that state commissions could or would attempt to deal with the problem presented, then federal regula-

tion is absolutely essential. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 27 (1961).

The gap opened by the court below is indeed an attractive one. Relying upon the decision below, it would now be possible for a pipeline company to offer to purchase gas at a higher price than the Commission would otherwise authorize upon the recital that the gas would be used in its local compressors or would be delivered to intrastate customers only. It would, furthermore, be possible for the pipeline company to discriminate among its suppliers by giving certain ones the privilege of selling gas which by agreement would be deemed to be segregated from the interstate stream and resold and consumed in the state of production, or to be used in compressor stations. The possibilities are limitless. It is not inconceivable to imagine the pipeline company telling the Commission that system gas being consumed in Plant A is Supplier B's gas, or that gas in Compressor C once belonged to Supplier D, or that gas heating Building E was purchased from Supplier F.

The gas involved in this proceeding will be produced in the Gulf Coast area of the State of Texas, and will be sold under Houston's and Lo-Vaca's "restricted use" contracts at initial prices of 19.5 and 22 cents per Mcf, respectively. If these "restricted use" sales to El Paso were made by producers the prices would go unregulated even though they exceed the Commission's *Statement of General Policy No. 61-1* price of 16 cents per Mcf[11] for the area in question. The opportunity afforded by this attractive gap would be open to all producers and the efforts of the Commission to stabilize gas prices through the Policy Statement would suffer a serious setback.

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11. Statement of General Policy No. 61-1, 18 C.F.R. Sec. 2.56. See *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 302, 313 (1963).

C. A Sale of Gas in Interstate Commerce Cannot Be Transmuted Into Something Else by Fiction.

The transactions of Houston and Lo-Vaca represent the ingenuity and imagination of fiction writers more than they represent the practicalities of the men who sell and transport an important natural resource. The contracting parties have made every effort to obscure realities and to emphasize fiction in their own unique version of contractual segregation. In their endeavors to escape regulation through the "restricted use" contractual device, they apparently have ignored the physical fact that all supplies of natural gas are not identical but are distinguishable by varying quality differentials. Furthermore, they have ignored the physical realities of the flow of gas within an interstate pipeline system. Both these matters, indeed, must be ignored if the superficial logic of the "restricted use" concept is to have any appeal.

1. Quality Differentials Have Been Ignored.

Lo-Vaca and Houston will rely upon the capability of El Paso to consume *volumes* of gas within its system equivalent to the *volumes* they will sell. However, there is no arrangement, physical or contractual, requiring El Paso to utilize for the specified uses natural gas of a *quality* equivalent to the *quality* of that sold by Lo-Vaca and Houston.

The Lo-Vaca and Houston sales represent different qualities of natural gas. The gas actually delivered by Houston and Lo-Vaca must, under the contracts, meet certain minimum quality specifications. Houston's gas must not have more than 1½ grains of hydrogen sulphide nor more than 30 grains of total sulphur per hundred cubic feet; it may have a maximum of 3% carbon dioxide and a minimum heating content of 950 Btu. (R. 89). Lo-Vaca gas, under both the March and May contracts, may have maximums of 1 grain of hydrogen sulphide and 20 grains of organic sulphur per hundred cubic feet; it may not have more than 2% carbon dioxide and may

not have a heating value of less than 1,000 Btu. (R. 137, 161). Recognizing quality differentials in natural gas supplies is the practice within the industry. Variations in quality may often be the reason for the price differentials which appear in the same producing area.

The Commission also recognizes quality differentials in natural gas. In *Humble Oil & Refining Co.*, 30 FPC 514 (1963), the Commission determined the rate partly on the basis of the surphur content of the gas supply involved. In *Transwestern Pipeline Co.*, 22 FPC 391, 398 (1959), the Commission adjusted price on the basis of carbon dioxide content. In *Northern Natural Gas Co.*, 28 FPC 1155, 1158 (1962), affirmed, 330 F.2d 226 (D.C. Cir. 1964), heating content was a critical factor in price determination. Heating content is, in fact, the subject matter of an investigation presently being conducted by the Commission. *Sunray DX Oil Co.*, 29 FPC 1079 (1963). Also pending before the Commission is a rule-making proceeding, entitled Docket No. R-200, wherein the Commission is considering quality standards to implement its *Statement of General Policy No. 61-1*., 18 C.F.R. Sec. 2.56.

The courts have affirmed the Commission's authority to make quality distinctions in supplies of gas for regulatory purposes. *The Pure Oil Co. v. Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962), involved a Commission finding that a sale of superior quality natural gas at a price higher than that provided for in other contracts did not escalate the prices in the other contracts which involved sales of lower quality gas. The court said:

> "The West Texas contract made available to El Paso gas from two newly developed Permian Basin fields, Emperor Field and South Kermit Field. The record contains evidence that the reserves of these fields are quite substantial; that the fields possess the exceptional quality of gas flow at an extremely high pressure with a consequent delivery potential which makes the gas exceptionally useful for peaking purposes; and the Commission, in agreement with the Examiner, found this quality to be a pertinent factor under the 'higher price' provisions of the Pure contracts which, given due con-

> sideration, sufficiently distinguishes the gas purchases from West Texas from those under the Pure contracts to preclude the payment to West Texas from being regarded as 'higher' than Pure's prices." 299 F.2d at 373.

See also *United Gas Improvement Co. v. Federal Power Commission*, 283 F.2d 817, 823 (9th Cir. 1960), cert. denied, 365 U.S. 879 (1961), holding that substantial variation in quality of gas should be considered in determining initial prices in certificate proceedings.

Houston and Lo-Vaca went to considerable length in their contracts to set down quality specifications. They also went to considerable length to "restrict" their supplies. Yet once their gas is received at Coquat Station and is commingled, all physical identity is admittedly lost. The volumes consumed in Texas will not necessarily have any quality relationship with the actual Houston gas. The same would be true respecting the relationship between Lo-Vaca's actual gas and whatever gas El Paso may consume in New Mexico or Arizona.

The record contains no evidence as to the quality of gas to be sold to Phillips at its plant in Texas, nor the quality or types of gas El Paso will use in its "compressors, treating plants, boilers, camps and other facilities * * *." (R. 149). But one supply of gas is not necessarily the substitute for another supply, no more than one grade of oil is necessarily the substitute for another grade.

In the *Public Utilities Commission* case, *supra*, the energy was distinguishable by use but was also physically the same energy as to each use. In *North Dakota*, *supra*, the "firm" supply and the "dump" supply came out of the tailgate of the same plant and the gas sold in intrastate commerce was apparently the same quality gas that was sold in interstate commerce. In *City of Hastings*, *supra*, the gas used by the city in its power plant was a portion of the same supply which was resold to the city's consumers. The facts in these cases made contractual segregation real and meaningful. In the case at bar such segregation is unreal and meaningless.

2. Contract Language Cannot Alter the Fact of Flow.

Language alone cannot control or change the actual facts. Whether a transaction is in interstate commerce is determined by the essential character of the commerce, not by the contract. *Baltimore & O.S.W.R.R. Co. v. Settle*, 260 U.S. 166, 170 (1922). According to the undisputed facts involved herein, there is no physical segregation of the Lo-Vaca and Houston gas from the gas resold in interstate commerce. The gas is segregated only in the sense that the parties say and imagine it is segregated.

In *Oklahoma Natural Gas Co.*, 23 FPC 291 (1960), the Commission faced a situation similar to the case at bar. Oklahoma Natural Gas Company, a producer of gas in the State of Oklahoma, entered into an agreement with Consolidated Gas Utilities Corporation, an interstate pipeline company, whereby Consolidated would furnish gas to Oklahoma Natural in one part of Oklahoma and would, in turn, receive a like quantity of gas from Oklahoma Natural in another part of the state. Under this exchange agreement Consolidated proposed to sell and deliver for consumption within Oklahoma an amount of gas from its system, now incorporating the supply received from Oklahoma Natural, which would exceed the amount so received from Oklahoma Natural. The Commission found that "it is inevitable that some of Oklahoma Natural's gas commingled with Consolidated gas will be physically transported out of Oklahoma for consumption outside the state." 23 FPC at 293. The Commission further stated:

> "Interstate commerce has taken place here because Oklahoma Natural has delivered gas which is transported outside the state and consumed outside it. This gas has entered the stream of interstate commerce, and has passed across the state border. The fact that the contracting parties agree that Consolidated will deliver to its Oklahoma customers a greater amount of gas does not affect the interstate character of the transaction." 23 FPC at 293.

In *Deep South Oil Co. of Texas v. Federal Power Commission*, 247 F.2d 882 (5th Cir. 1957), a Texas producer of natural gas

argued that its sale of gas at the wellhead to a pipeline company, which, in turn, sold the gas to another pipeline company for resale in interstate commerce, was not subject to Commission jurisdiction because the gas, after delivery, was processed in Texas. The court rejected this argument and rested its decision upon the physical facts:

> "The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently, there can be no question that petitioner is making sales for resale within the meaning of the Act." 247 F.2d at 888.

Mere words or intentions are never sufficient to change the physical aspects of commerce. Fiction must yield to fact—in every case.

CONCLUSION

For the foregoing reasons, California prays that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed, and that the orders of the Federal Power Commission involved herein be affirmed.

Respectfully submitted,

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September 17, 1964

(Appendix Follows)

Appendix

RELEVANT PARTS OF STATUTES INVOLVED

The relevant parts of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821-833 (1938), 15 U.S.C. §§ 717-717w (1958)) involved in this proceeding are as follows:

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821, (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby

declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. §717(c)]

SEC. 2. When used in this act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively. [52 Stat. 821 (1938); 15 U. S. C. § 717a]

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f(a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake

the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U.S.C. § 717f (f)]

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already

being served by another natural-gas company. [56 Stat. 84 (1942); 15 U. S. C. § 717f (g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U. S. C. § 717f (h)]

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the

Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 850 (1938); 15 U.S.C. § 717o]

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Supreme Court of the United States

October Term, 1964

PEOPLE OF THE STATE OF CALIFORNIA and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners* v. LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY, *Respondents*	No. 46
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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October 19, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1964

PEOPLE OF THE STATE OF CALIFORNIA and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY,
Respondents

No. 46

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,
Petitioners

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY,
Respondents

No. 47

FEDERAL POWER COMMISSION,
Petitioner

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY,
Respondents

No. 57

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

This brief, *amicus curiae*, is filed with the consent of the parties.

INTEREST OF AMICUS CURIAE

Independent Natural Gas Association of America is a trade association whose membership includes most of the major pipeline companies engaged in the transportation and sale of natural gas in interstate commerce subject to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act. For many years this Association has participated in numerous proceedings before the Commission involving issues affecting the general interests of the natural gas industry and has also participated before this Court and the various courts of appeals in cases arising out of Commission orders.

If the sweeping jurisdictional theory advanced by the Petitioners is adopted by this Court, the Commission's jurisdiction under the Natural Gas Act would burgeon to cover every sale of natural gas which eventually finds its way into an interstate pipeline system, without regard to the purposes for which such sale is made, the contractual arrangements underlying it, or the intended ultimate use of the natural gas involved. Under this theory, any natural gas capable of physical movement into a resale market in another state is designated a sale for resale, notwithstanding the purpose and intent of the parties.

In addition, the Commission would have transportation jurisdiction over pipeline facilities leading to the point of such sales. Transportation arrangements, under which the transporting pipeline neither purchases nor sells the gas transported, would be construed as sales in interstate commerce for resale by the pipeline. Acceptance of Petitioners' theory by this Court would appropriate to the Commission a broad new area of regulatory authority, an area not envisioned by Congress in providing for divided

federal-state regulatory authority. This case, therefore, is of substantial interest to the pipeline-company members of this Association.

QUESTION PRESENTED

Do the provisions of the Natural Gas Act applicable to sales in interstate commerce for resale and to transportation in interstate commerce apply to separately identifiable direct sales for consumption by the purchaser or for sale in intrastate commerce by the purchaser, and to the attendant transportation to the point of sale, all exempt from jurisdiction under the Act, where such gas becomes commingled in transit after sale with gas subject to resale jurisdiction?

STATEMENT

The facts of this case are not in dispute. Two distinct sales are in issue; one for consumption in the state in which the gas is produced, the other for consumption by the purchaser beyond the state in which the gas is produced. The question is one of law and involves the jurisdictional consequences of commingling natural gas, otherwise not subject to jurisdiction under the Natural Gas Act,[1] either because it

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[1] 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w. Section 1(b) of the Natural Gas Act, set forth in the Appendix, contains the basic jurisdictional provisions in issue. It provides for jurisdiction over "transportation of natural gas in interstate commerce", "sale in interstate commerce of natural gas for resale", but states that such jurisdiction does not apply "to any other transportation or sale." Thus all direct sales of natural gas, sales for resale in intrastate commerce, and transportation in intrastate commerce are exempt from jurisdiction under the Act. The question of resale jurisdiction is present with respect to the proposals of both Lo-Vaca Gathering Company and Houston Pipe Line Company. The question of transportation jurisdiction is present only with respect to the proposal of Houston, since it is agreed that a separate proposed sale by Lo-Vaca, not in issue here, would involve transportation in interstate commerce.

is a *direct* sale for the buyers' consumption or for resale in *intra*state commerce, with other natural gas subject to such jurisdiction because sold in *inter*state commerce for resale. Since the Commission's order, reversed by the court below, was declaratory in nature, the question must be viewed abstractly, no record having been made as to the "public convenience and necessity"[2] of the interdependent certificate proposals.

The purchaser, El Paso, proposes to construct, through a subsidiary, El Paso Gas Supply Company, a pipeline to transport the gas purchases involved in this case to its existing facilities (R. 485). This proposed line of 227 miles of large-diameter pipe would connect into El Paso's existing system which proceeds in a westerly direction to the California border, where the bulk of its sales are made. Lo-Vaca and Houston would gather and transport gas which they buy from producers in the gulf coast area of Texas, and sell this gas to El Paso at separate delivery points on the Supply Company's line.

Three separate and distinct contracts were entered into between El Paso and the local gathering-transporting companies. *Two* are involved in this case. One is between Houston and El Paso for 70,000 Mcf a day to be delivered near Three Rivers, Texas (R. 416-459). Under this contract the Houston gas, commingled after delivery with Lo-Vaca gas and later commingled with gas from other sources in Texas, would be consumed wholly in Texas in El Paso's compressor stations and at a gasoline plant owned by

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[2] Section 7(c) of the Natural Gas Act [15 U.S.C. 717f(c)] set forth in the Appendix. This is the basic provision of the Act regulating expansion either in terms of transportation or sales or both.

Phillips Petroleum Company. El Paso at all times would make certain, that such consumption in Texas would be in excess of gas purchased from Houston, and would maintain the metering and delivery facilities necessary to effectuate this purpose.

The contract between Houston and El Paso, specifying the consumption of Houston's gas in Texas, is consistent with Houston's existing operations which are entirely intrastate (R.104). Most of the contracts under which Houston purchases the gas that it transports and sells include a provision permitting the seller to withdraw its gas if such gas is to be resold in interstate commerce (R. 109-111).

Lo-Vaca entered into two separate and distinct contracts with El Paso, the first for 50,000 Mcf a day, the second also for 50,000 Mcf a day which was later increased to 70,000 Mcf a day (R. 820-876). The two contracts were negotiated separately and are supplied by separate gas reserves. The first contract involves a *direct* sale[3] to El Paso for use in its compressors and other facilities outside the State of Texas. The second contract is not restricted as to the use and disposition of the natural gas by El Paso, is not in issue in this case, and would be a sale in interstate commerce for resale subject to Commission jurisdiction. The purchase and receipt of the gas by El Paso under each contract would involve separate facilities and separate metering, and the contract requires El Paso to make certain that its consumption of gas outside Texas would at all times exceed the volumes purchased under the first, restricted-use contract.

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[3] Only sales for resale are subject to Commission jurisdiction; Section 1(b) of the Natural Gas Act, *op. cit. supra*, note 1.

Houston did not file an application for a certificate of public convenience and necessity under the Natural Gas Act. It did file a "Petition for Declaratory Order to Remove Uncertainty", requesting a determination of status in advance of deliveries (R. 907-923). Lo-Vaca filed two certificate applications: one for "gathering and delivery" of the gas to be sold under its restricted-use contract, the other for "gathering and sale" under the contract not in issue in this case.[4] As to both sales, Lo-Vaca requested certificate authorization for transportation. The producers selling to Lo-Vaca must obtain certificate authorization from the Commission since their sales would be sales for resale.

El Paso and its subsidiary, Gas Supply, applied for certificates of a routine nature from the Commission, Gas Supply for authority to construct and operate the 227-mile, 30-inch pipe line to transport gas for El Paso, and El Paso for authority to make additional sales and for sundry facilities necessary to handle the additional supply of gas. The initial cost of the gas proposed to be purchased by El Paso is 22 cents an Mcf under both Lo-Vaca contracts, and approximately 19½ cents an Mcf under the Houston contract.

An examiner of the Commission held that the Houston sale was not subject to jurisdiction, but that the Lo-Vaca restricted-use sale was jurisdictional (R. 994-1019). The examiner held that the Houston proposal was non-jurisdictional because the gas would be produced wholly in Texas, transported only in Texas, not commingled with gas from outside the state, and separated from the commingled stream

[4] Section 1(b), *op. cit. supra*, note 1; R. 812-817.

before any part would leave the State (R. 1010). The Commission, on October 23, 1961, reversed as to the Houston sale, one Commissioner dissenting, holding that both sales were for resale and subject to jurisdiction (R. 1100-1113). The Court of Appeals for the Fifth Circuit reversed as to both sales, one judge dissenting, and this decision is now before this Court for review.

SUMMARY OF ARGUMENT

The decision of the court below is wholly consistent with and supported by judicial and Commission precedents specifically applicable to a delineation of the Commission's resale jurisdiction under the Natural Gas Act. It accords with the comprehensive plan for divided federal and state regulation contemplated by Congress in enacting the Natural Gas Act. The proposed Houston and Lo-Vaca transactions are neither in terms nor in fact sales for resale in interstate commerce subject to the jurisdiction of the Commission under the Natural Gas Act. In determining whether a sale is a direct sale or a sale for resale the focus of the Act is upon the sale itself, the provisions of the contract as contemplated by the parties, not upon the events consequent to physical commingling as urged under the sweeping theory advanced by the Petitioners. Nor do the decisions of this Court permit a flexible standard in determining jurisdiction; the contentions of Petitioners that the decision below will jeopardize effective regulation, if permissible at all, do not withstand analysis.

ARGUMENT

A. Introduction

In both the Lo-Vaca and the Houston sales the gas proposed to be sold will be commingled with other gas purchased by El Paso which is destined for resale in interstate commerce. The question therefore becomes: does the mere fact that the gas will be transported in a commingled stream, and that consequently the precise molecules of gas which will be consumed either within Texas or by El Paso in its compressor stations outside of Texas cannot be physically traced or separately indentified, convert the proposed non-jurisdictional sales into sales for resale, subject to the Commission's jurisdiction under Section 1(b) of the Natural Gas Act?

The Petitioners argue that the admitted showing that the *volumes* sold by Houston and Lo-Vaca would be consumed as proposed is not enough; and that, to be considered direct sales as specified by the contract, Houston and Lo-Vaca would have to establish that the gas sold for such purposes was physically supplied by them, and not by other suppliers. If this theory were to be accepted by this Court, the Commission would have resale jurisdiction in all instances in which the gas being sold could be transported physically into another state for resale.[5] This is a

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[5] The 1962 Annual Report to Congress of the Federal Power Commission states, at page 25, under the heading "New Regulatory Policies":

> "• • • the Commission held that its jurisdiction over the sale of natural gas to interstate pipeline companies included sales where the gas can move physically into another State for resale, regardless of any contractual provisions designed to limit its use • • • once the gas is received into a company's general system transportation facilities, it will be used for every system purpose because it would be physically impossible to restrict the consumption of the gas • • •."

broad and sweeping assertion of jurisdiction, an assertion with significance far beyond the confines of this case. It has no support in the decided cases, and it would breach that "bright line easily ascertained" between federal and state jurisdiction only recently restated by this Court in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205 at 215 (1964).

B. Commingling in a Pipeline of Natural Gas, Part of Which Will Not Be Resold in Interstate Commerce and the Remainder of Which Will Be So Resold, Does Not in and of Itself Subject the Entire Stream of Gas to the Commission's Jurisdiction

Long before the Natural Gas Act was passed, this Court had occasion to concern itself with the intricacies of federal and state jurisdiction over a commingled stream of gas. In *Peoples Natural Gas Co.* v. *P.S.C. of Pennsylvania*, 270 U.S. 550 (1926), it was held that a state commission did not burden interstate commerce by ordering an interstate pipeline company to deliver, from a commingled interstate and intrastate stream of gas, a volume of gas equivalent to the amount of intrastate gas in the commingled stream. This Court there said:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. * * *". (*Id.* at 554-555)

Since passage of the Natural Gas Act, this Court, as respects commingling, has never departed from the

doctrine enunciated in the *Peoples* case. Thus, in *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945), the Court stated:

> "It is thus apparent that the pipeline from Texas to Colorado serves three different uses; (a) intrastate transportation and sale in Texas; (b) interstate transportation and sale to industrial customers; and (c) interstate transportation to distribution companies for resale. Only some of these activities are subject to the jurisdiction of the Commission * * *". (*Id.* at 585-586)

Similarly, in *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1960), a utility company in New York proposed to purchase gas directly for its own consumption from producers in Texas, transportation of such gas to be provided by enlargement of the existing facilities of the pipeline company. In affirming the Commission's denial of certificate authorization to the pipeline to construct the facilities needed to transport the gas, this Court held that the "direct" sale did "not entail a sale for resale in interstate commerce, [and] is not subject to the Commission's jurisdiction except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale" (*id.* at 4), although the direct-sale gas would have been commingled with gas from many sources, and its molecules could not have been separately identified.

This Court's language in *U. S.* v. *P. U. C. of California*, 345 U.S. 295 (1953), is of particular importance because it has been cited and relied upon in several succeeding cases. An electric company sold to the Navy Department in California energy produced in California. The Department then transmitted the

energy over its own line into Nevada where it consumed most of the energy itself, but resold a minor part. One contract covered the entire sale in California. This Court reversed the decision of the California Supreme Court that the California Commission had jurisdiction over the entire sale. Contentions that Power Commission jurisdiction attached only to the portion of the energy resold were rejected because the record did not justify that result (*id.* at 317). Continuing, this Court stated (*id.* at 317-318):

> "* * * Assuming respondent's theory [proportional limitation] this would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable. * * * there is no record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the 'sales' themselves were separate, and it is in those terms that the Act would require us to fix the limits of the jurisdictional grant. * * *" (footnote omitted)

Shortly thereafter this Court denied certiorari (345 U.S. 934) to a decision which affirmed a Power Commission determination that it had jurisdiction over the entire sale, *California Electric Power Co.* v. *F.P.C.*, 199 F. 2d 206 (9th Cir. 1953).

In the footnote omitted from the preceding quotation (345 U.S. at 318), this Court noted that "[t]he Commission's own view of the matter [proportional limitation of jurisdiction] may still be in the formative stage", citing *Colorado Interstate Gas Co.* v. *F.P.C.*, 185 F. 2d 357 (3rd Cir. 1950), and *Hastings* v. *Kansas-Nebraska Natural Gas Co.*, 12 FPC 3. In the *Colorado* case, the court had held that the scope of the Commission's resale jurisdiction over a commingled stream of

gas, some of which was resold and some was not, was not properly before it. The Commission later held, consistent with the *Hastings* case, discussed hereafter, that a sale of gas by Colorado Interstate under a separate contract pursuant to which the purchaser would itself consume the gas, even though commingled with gas sold for resale, was a direct sale not subject to Commission jurisdiction. *Colorado Interstate Gas Co.*, 19 FPC 1012.

The *Hastings* case was reviewed in *City of Hastings, Nebraska* v. *F.P.C.*, 221 F. 2d 31 (DC Cir. 1954). Gas under separate contracts, part of which was to be resold and part to be used by the purchaser in its power plant, was transported in the same pipeline. The lower court held, affirming the Commission, that the direct sale was not subject to the Commission's resale jurisdiction. This Court denied certiorari, 349 U.S. 920.[6]

In *North Dakota* v. *F.P.C.*, 247 F. 2d 173 (8th Cir. 1957), a pipeline purchased gas in North Dakota under four contracts involving two sellers, and transported the gas westerly through its pipeline which extended into the State of Montana. En route, part of the gas was delivered for resale in four communities in North Dakota, and the balance was transported across the state line into Montana for resale. The lower court upheld the Commission's determination that the sales for resale in the four communities were made in intrastate commerce, and consequently not subject to the Commission's juris-

[6] For related litigation, in which approval was expressed of the concept of identification by volumes, see *City of Hastings, Nebraska* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 226 F. 2d 419, 422 (8th Cir. 1955).

diction. In short, the fact that all of the gas—both that destined for intrastate and that destined for interstate sales—was commingled did not change the character of the intrastate sales.

In *Amerada Petroleum Corporation* v. *F.P.C.*, 334 F. 2d 404 (8th Cir. 1964), the Commission was unanimously reversed in a factual situation substantially the same—both as to parties, circumstances, and locale—as in *North Dakota* v. *F.P.C.* There, as in *North Dakota*, the intrastate gas was identified by volume, by delivery and metering both on and off the pipeline, and by separate contracts. Notwithstanding the fact that the intrastate stream was commingled with gas destined to cross the state line for resale in interstate commerce, the intrastate resales were held not to be interstate commerce, and hence not subject to Commission jurisdiction.[7]

The *rationale* underlying these cases is not difficult to discern. Natural gas is a fungible commodity.[8] Since it is fully interchangeable, the commingling in a common stream of gas which is not subject to the Commission's resale jurisdiction with other gas which

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[7] In numerous gas cases, the Commission has either directly or by implication held that the fact of commingling was not a basis for a finding of jurisdiction: *Trans-Continental Gas Pipe Line Corp., Inc.*, 7 FPC 24 (1948); *Colorado Interstate Gas Co.*, 19 FPC 1012 (1958); *Hope Producing Co.*, Docket No. G-15537, order issued February 3, 1959; *Houston Texas Gas & Oil Corp.*, 16 FPC 118 (1956); *Shell Oil Co.*, 25 FPC 1316 (1961); *City of Colton* v. *Southern California Edison Co.*, 26 FPC 223, 234 5, 237 (1961). *Contra: Oklahoma Natural Gas Co.*, 23 FPC 291 (1960).

[8] For an article dealing with this general subject, see Arnold, 23 Col. L. Rev. 235 (1923). The laws governing fungibles may be traced to the time of Justinian; see *Institutes of Justinian*, Liber II, Title I, Section 28.

is so subject does not, in and of itself, change the legal status of the "non-jurisdictional" gas: compare *U. S.* v. *Luther,* 225 F. 2d 499, 504 (10th Cir. 1955), *certiorari* denied, 350 U.S. 947 (1955); *Central States Corp.* v. *Luther,* 215 F. 2d 38, 45 (10th Cir., 1954), *certiorari* denied, 348 U.S. 951 (1954); *Standard Bank* v. *Lowman,* 1 F. 2d 935, 940 (W.D. Wash. 1924); and *In Re Wyoming Valley Collieries Co.,* 29 F. Supp. 106 (M.D. Penn. 1939).

As these cases demonstrate, the tracing is of volumes, not of the individual units making up such volumes. Thus, in *Eureka Pipeline Co.* v. *Hallanan,* 257 U.S. 265 (1921), an oil pipeline case, it was conceded that a state had the power to tax the part of the commingled oil stream that was produced and consumed within the state. To like effect is *Federal Tender Board No. 1* v. *Haynes Oil Corp.,* 80 F. 2d 468 (5th Cir. 1935), in which the court upheld proportionate separation of commingled volumes of oil against the government's contention that commingling of lawfully produced oil with "contraband oil" had destroyed the separate character of the lawful oil. In permitting separation by volume, the court stated:

> "* * * Commingling and proportionate separation is daily practiced in the business of grain elevators, pipelines and the like. We see no reason why the practice is not proper here. * * *" (*Id.* at p. 469)[9]

The cited cases demonstrate that the mere fact that the Houston and Lo-Vaca gas will be physically com-

[9] To like effect is *Humble Oil and Refining Co.* v. *Texas and Pacific Railway Co.,* Tex. 289 S.W. 2d. 547 (1955). *Cf. Chicago, Milwaukee & St. Paul Railway Co.* v. *P.U.C. of Illinois,* 242 U.S. 341 (1917).

mingled with other gas destined for resale does not, in and of itself, convert the proposed sales to jurisdictional resales. Likewise physical commingling does not convert Houston's transportation to the point of sale into transportation in interstate commerce. Houston's proposed sale for consumption in the state of origin is not a sale in interstate commerce. Nor is it a sale in interstate commerce for resale. Lo-Vaca's proposed sale, while in interstate commerce, is not a sale for resale since it is sold for consumption by the purchaser.

Petitioners nevertheless urge that this Court's prior decisions in this and related fields require that the court below be reversed. We now propose to show that Petitioners have misconstrued the cases and that the decision of the court below is consistent with the regulatory scheme of the Natural Gas Act.

C. The Commission's Jurisdiction Over Sales Is Limited to Sales in Interstate Commerce for Resale, and Neither the Lo-Vaca Nor the Houston Sale Fits That Category

In *Panhandle Eastern Pipe Line Co.* v. *P.U.C. of Indiana,* 332 U.S. 507, this Court stated (*id.* at 516-517):

> "* * * Three things and three things only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
>
> * * * * *
>
> The line of the statute was thus clear and complete. It cut sharply and cleanly between sales

> for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise and the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." (footnote omitted)

This construction of the Act was recently reaffirmed in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 214-215. The decided cases show that the "realities of gas flow,"[10] on which Petitioners rely, have no bearing on the issue of the Commission's resale jurisdiction. The focus of the Act is on *sales*, and the *contracts* under which such sales are made, not only for the purpose of determining whether such sales are jurisdictional, but also for the purpose of determining the propriety and legality of the rates and charges applicable to a sale once it has been concluded that the sale is jurisdictional: *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

The Commission relies on a series of electric and gas cases[11] which it says demonstrate that this Court has "relied upon the physical facts in determining whether sales are in interstate commerce." And indeed the Court has; but such cases bear on the issue of whether there is interstate commerce—not the question which the Petitioners pose and not on the

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[10] FPC Br. 11; Cal. Br. 20, "physical flow"; Cal. Cos. Br. 5 "physically transported." Also, the Petitioners state the "question presented" by assuming that the question is answerable in physical terms.

[11] *Jersey Central Power & Light Co.* v. *F.P.C.*, 319 U.S. 61; *Interstate Natural Gas Co.* v. *F.P.C.*, 331 U.S. 682, 687; *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 467; *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 529; *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 209 n. 5.

issue of whether certain sales are direct or wholesales. Thus, the *Jersey Central* and *East Ohio* cases turned upon the jurisdictional issue of whether the facilities involved were in interstate commerce, not on whether any sales involved were resales in interstate commerce. Furthermore, the Commission's reliance, at page 13 of its brief, on a quotation from *Connecticut* is out of context. It is not qualified, as it must be. The statement in that case that "the test under Part II of the Power Act is 'engineering and scientific, rather than * * * legalistic or governmental,'" as this Court's opinion shows, was part of a draft proposal applicable to the proposed Commission's jurisdiction which was *not* fully accepted by Congress. Instead, an exemption "over facilities used in local distribution" was adopted by Congress. It is true that this Court referred to the technological transmission test in the recent *California Edison* case (276 U.S. 205, 209 n. 5) as stated by the Commission (FPC Br. 13). But in that case this Court likewise referred to the definition of facilities used in local distribution as

> "* * * a limitation on FPC jurisdiction and a legal standard to be given effect in addition to the technological transmission test * * *" (*id.* at 210 n. 6),

citing *Connecticut*. The test adopted was consequently both "legalistic" and "governmental." It should be noted that this case was concerned with the question of jurisdiction over facilities—not inquiry into the nature of sales—a necessary predicate to the regulation of the company's accounting practices over which the Commission had asserted jurisdiction.

The *Interstate Natural* case dealt in part with the issue of whether sales were in interstate commerce; but the Commission's long quotation (FPC Br. 13-14) merely recites the fact of interstate movement, which is beside the point here. The Commission's reliance on that case, as well as on *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882 (5th Cir. 1957), *certiorari* denied, 355 U.S. 930 (1958), and *Shell Oil Co.* v. *F.P.C.*, 247 F. 2d 900 (5th Cir. 1957) (FPC Br. 15, 18-19; Cal. Br. 36; Cal. Cos. Br. 8), is misplaced. These cases did not reach the issue presented here. In each case the company claimed that their sale was within the "production or gathering" exemption of Section 1(b) of the Act, and this was the principal issue involved. In all of these cases the contracts involved contemplated that a part or all of the gas would be resold in interstate commerce. As the court in *Deep South* noted: "All of the parties to the contract * * * fully understood that the gas was to be resold in wholesale quantities by the buyer." (247 F. 2d at 888)

As a second line of attack, Petitioners seek to distinguish certain cases relied upon by the court below, which held, as part of the consistent line of authorities cited in the first part of this argument, that sales are identifiable by volume and remain non-jurisdictional although commingled with jurisdictional volumes. Essentially the Commission (FPC Br. 27-34) and the State of California (Cal. Br. 22-29) assert that the *P.U.C. of California* case (345 U.S. 295), the *City of Hastings* case (221 F. 2d 31, *certiorari* denied, 349 U.S. 920), and the *North Dakota* case (247 F. 2d 173) involve a single source of supply, and that the lack of this element somehow distinguishes the sales at issue in this case. In *P.U.C.* there was one supplier

and one contract, with the observation that the result might have been different had there been a second contract covering the energy to be consumed by the buyer. In *Hastings* there was one supplier and two separate contracts. In *North Dakota* there were two suppliers and four separate contracts. *In this case there are two suppliers and three separate contracts.* We submit that the reason *P.U.C.* was decided in favor of jurisdiction, and *Hastings* and *North Dakota* were decided against jurisdiction, is that the contract itself in *P.U.C.* contemplated a resale of a portion of the energy in interstate commerce, while in *Hastings* and *North Dakota* the non-jurisdictional contracts contemplated that *none* of the gas so sold would be resold in interstate commerce.

The Commission also contends that in "other, but related, contexts, this Court has also disregarded provisons of contracts which place a fictitious construction upon business transactions solely for the purpose of achieving a particular jurisdictional result" (FPC Br. 15).[12] But neither the cases nor the very general proposition is relevant to this case. There is no "fiction" in the Houston or Lo-Vaca contracts; they both recognize the element of commingling (R. 421, R. 842), and there is no question that El Paso would do its part by consuming quantities of gas equal to or in excess of the contract volumes. None of the cases cited by the Commisison in this connection was con-

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[12] Citing *Sprout* v. *South Bend*, 277 U.S. 163, 168; *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390; *B&O S.W. R.R. Co.* v. *Settle*, 260 U.S. 166, 170, also cited in the California brief, p. 36; *U. S.* v. *San Francisco*, 310 U.S. 16, 28; *Higgins* v. *Smith*, 308 U.S. 473, 477-478; *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 526-527. Compare *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257.

cerned with fungibility.[13] Had there been there is every reason to believe that separate treatment would have been accorded volumes identifiable by contract. Compare *Humble Oil & Refining Co.* v. *Texas & Pacific Railway Co., supra,* p. 14.

In its "Introduction and Summary" (FPC Br. 10) the Commission states:

> "It is settled that where part of a stream of natural gas or electric energy sold under a single contract is interstate in character and is resold by the purchaser, the entire transaction falls within the Commission's jurisdiction, even though the remainder is consumed by the purchaser itself or within the producing State * * *",

citing *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414, *U. S.* v. *P.U.C. of California, supra,* p. 10, and *F.P.C.* v. *Southern California Edison Co., supra,* p. 9. Plainly this statement is not relevant here where *separate* contracts are involved.[14] But an analysis of the cases is illuminating. Each involved a single sale, under a single contract, in which part of the energy would be resold in interstate commerce. This fact, not the quantum of energy to be resold in interstate commerce, determined the Commission's jurisdiction. In short, the cases were decided upon

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[13] Indeed, in the *Atlantic Coast Line* case (275 U.S. at 270-271), the oil involved was recognized by this Court as a fungible, but it was not "labeled or identified in any particular way." This Court recognized, however, identification of a fungible, saying: "It is not a question of maintaining the identity of oil as if a fungible in storage tanks through which it passed."

[14] In addition, for a description of the great difference in the physical operations involved in the *Pennsylvania* case, see *Pennsylvania Water & Power Co.* v. *F.P.C.*, 193 F. 2d 230 at 233.

the basis of the nature of the *sale*, not on the "realities" in terms of the disposition of the energy.

D. Asserted Consequences of the Decision Below

We agree with the Commission that "the force of this Court's decisions remains unimpaired and that the principles on which the decisions rest should be applied consistently." (FPC Br. 34) We have shown that the transactions here proposed *are* consistent with this Court's prior holdings elucidating the scheme of regulation envisaged by the Natural Gas Act. In fact, the jurisdictional issues here presented do not lend themselves to a "flexible" approach to the permissible reach of federal jurisdiction over interstate transactions. As this Court stated in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 214-216:

> "* * * the court held[15] that Congress, rather than adopting this flexible approach, * * * 'undertook to regulate . . . without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases.' * * *
>
> "This conclusion has been consistently reaffirmed in subsequent cases. In Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507, which considered the reach of § 1(b) of the Natural Gas Act, the Court said that 'the line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities, or otherwise' * * *

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[15] Referring to *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498.

> "* * * In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States. * * *"

The Commission complains that "major opportunities for discrimination" and the creation of a "class of independent producer sales which are free from effective regulation, state or federal" would result from a holding in this Court that the transactions here involved are not subject to its resale jurisdiction (FPC Br. 22). And it contends that a "gap" in the comprehensive scheme of regulations established by Congress would thereby result (FPC Br. 24-25).

We submit that under this Court's prior rulings no gap would be created in the Congressional scheme of regulation if this Court decides that the contracts in question are not subject to the Commission's resale jurisdiction. In the first place, unlike the gap to which this Court referred in the *Transcontinental* case (*F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 at 28), there is no inhibition here on the power of the states to exercise jurisdiction over the sales in

issue;[16] indeed, in the case at hand, this authority has been implemented by statute.[17]

Apart from this, the test established by Congress and consistently followed by this Court does not depend on the degree of jurisdiction actually being exercised by the states; rather, it is coterminous with the scope of permissible state jurisdiction as it was thought to exist at the time of *Attleboro*.[18] Thus it is very questionable whether arguments questioning the effectiveness of state regulation are appropriate (FPC Br. 24).

Responding, nevertheless, to these arguments, the alleged dire consequences of sustaining the lower court (FPC Br. 23-27) do not realistically portray the extent of the Commission's jurisdiction under the Natural Gas Act. Before El Paso can either purchase or transport the gas here in issue, it must obtain a certificate of public convenience and necessity, subject to the evidentiary burden of proof imposed on it by the

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[16] *U.S.* v. *P.U.C. of Califorina, supra*, p. 10. It is clear that California could have continued to exercise jurisdiction if none of the energy had been resold.

[17] As to gas pipelines see Vernon's Texas Annotated Statutes 6056-6066. The purpose of this regulatory act is the protection of the consumer: *State* v. *Public Service Corp. of Texas*, 88 S.W. 2d 627 (Tex. Civ. App. 1936). With respect to Lo-Vaca, the Commission has recently held that its existing operations were subject to the jurisdiction of the Texas Railroad Commission, and that such regulatory jurisdiction was being exercised: *United Gas Pipe Line Co.* v. *Coastal States Gas Producing Co.*, Docket No. CP64-75, Opinion No. 419 issued February 10, 1964, mimeo. ed. p. 4.

[18] *P.U.C.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83; *F.P.C.* v. ***Southern California Edison Co., supra***, p. 9, and the cases cited therein.

provisions of Section 7 of the Natural Gas Act. Section 7 (c)[19] provides that

> "* * * a certificate shall be issued * * * *if* it is found * * * that the proposed service, rate, operation, construction, extension or acquisition, to the extent authorized by the certificate, *is or will be required* by the present or future public convenience and necessity; *otherwise such application shall be denied.* * * *" (Emphasis supplied)

Section 19 (b)[20] of the Act pertaining to the court review of Commission orders provides:

> "* * * The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *"

The *Transcontinental* case (365 U.S. 1),—on which the Commission relies to support its "gap" theory—demonstrates that the Commission's obligation to protect the interests of ultimate consumers can be effectively exercised in this and in similar cases arising in the future under the provisions of Section 7 of the Act. As the Commission itself points out (F.P.C. Br. 22):

> "* * * However, under its plenary power over 'the transportation of Natural gas in interstate commerce' (§§ 1 (b) and 7 (c) of the Act, 15 U.S.C. 717 b), 717f (c)—the power successfully asserted in Transcontinental—the Commission would retain authority to certificate the pipeline's transportation service on such conditions as might

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[19] 15 U.S.C. 717 f(c).

[20] 15 U.S.C. 717 r(b).

be required by the public convenience and necessity.'"[21]

What was true of Transcontinental's proposed transportation service would be equally true of El Paso's proposed transportation, resale, and usage in its compressor stations of the gas it proposes to purchase here. In that case—in which, as here, both jurisdictional gas and non-jurisdictional gas were proposed to be commingled—it was held that the Commission had plenary authority to weigh the various considerations bearing on the public convenience and necessity and, in fact, to refuse to certificate the project at all. The same authority is available to it here.[22]

With reference to control over construction of new facilities, a cardinal difference between the Natural Gas Act and the Federal Power Act (16 U.S.C. 791a-825r) should be considered. The Commission has no certificate authority under the Power Act, only authority over certain interconnections (16 U.S.C. 824a). This distinction is significant because most of the cases relied upon by the Commission arose under the Power Act. The two Acts are entirely different in terms of the scope of federal regulation.

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[21] See this Court's decision in *Atlantic Refining Co.* v. *F.P.C.*, 360 U.S. 378 (1959), in which it was pointed out that Sections 7 (e) and 4 (c) were the "heart of the Act." (*id.* at 388)

[22] It is in light of this that the Commission's quotation from the *Transcontinental case* (F.P.C. Br. 24-25) is to be understood; the question presented there was the scope of Commission authority under Section 7 of this Act—*not Section 1(b)*—, and the Court's references to a "gap" and its statement "that Congress desired regulation by federal authorities rather than nonregulation" were made in that context.

Furthermore, the examples of alleged discrimination listed by the Commission at pages 23-24 of its Brief simply do not mirror the actuality of the Commission's regulatory authority under the Natural Gas Act. A pipeline proposing to obtain a certificate is *not* free to designate the "particular source * * * from which the gas should be deemed to come"—we would say, rather, free to designate the particular use to which gas from a specific source will be put—unless the Commission first concludes that the proposal is in the public interest, and that its application for a certificate should either be granted unconditionally, or on such modified basis as the public interest may require. Nor is a pipeline free under established Commission rate procedures, to allocate to non-jurisdictional customers its purported lower gas-purchase costs from non-jurisdictional sources.[23]

The proposed Houston sale demonstrates some of the advantages of limited federal jurisdiction over sales. Most of Houston's contracts with its producers would terminate if it sold gas in interstate commerce. Hence a finding that its proposed sale to El Paso was for resale in interstate commerce would of necessity make it impossible for Houston to carry through its proposal, in spite of the fact that the sale has substantial ad-

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[23] See Commission Opinion No. 428, *United Gas Pipe Line Co.*, Docket No. RP63-1, issued May 14, 1964, mimeo. ed. p. 17. Under these procedures *all* gas purchase costs are "rolled-in" before determining, on an Mcf basis, the gas-purchase cost to be attributed to jurisdictional customers. Thus discrimination in favor of a non-jurisdictional customers would be avoided by allocating average gas costs to jurisdictional customers, so that the pipeline would not recover its gas costs if the rate to the non-jurisdictional customer was based upon the low-cost gas supply.

vantages for El Paso and its customers.[24] The common and highly beneficial meshing of interstate with intrastate sales and operations, heretofore considered separable, may well become impossible in the future if it is concluded by this Court that transactions such as the one in question are subject to the Commission's resale jurisdiction. As a further example, an application now pending before the Commission contemplates joint use by an interstate and an intrastate pipeline of a storage field owned by the intrastate company. The latter will not effectuate the proposal if the Commission concludes that the company will thereby become subject to Commission jurisdiction under the Natural Gas Act;[25] and a decision by this Court sustaining Commission jurisdiction on the theory advanced by the Commission would, in our opinion, have just that effect.

Such an extension of federal regulatory authority is neither necessary nor within the scope of the jurisdictional powers granted the Commission under the Natural Gas Act. Rather than provide additional protection to ultimate consumers, we believe that it would operate to their detriment.

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[24] Houston's contract price is approximately 19½ cents an Mcf, which includes all of Houston's gathering and transportation. The Commission's wellhead ceiling price for resales of gas in Live Oak County is 16 cents an Mcf (Eighth Amendment, issued December 9, 1963, to the Commission's Statement of General Policy No. 61-1). Houston's average system cost is approximately 13½ cents an Mcf (R. 439).

[25] See order for hearing issued September 16, 1964, in FPC Docket Nos. CP64-150, *et al.*, *Natural Gas Pipeline Co., et al.*

CONCLUSION

For the foregoing reasons, the opinion of the court under review should be affirmed.

Respectfully submitted,

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October 19, 1964

APPENDIX

Excerpts from Natural Gas Act

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. • • •

• • • • • • • • • • •

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (1946)]

• • • • • • • • • • •

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. • • •

• • • • • • • • • • •

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which applica-

tion is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c) (1946)].

* * * * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of

the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e) (1946)]

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REHEARING; COURT REVIEW OF ORDERS

SEC. 19. * * *

* * * * * * * * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of

the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 46

PEOPLE OF STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, EL PASO NATURAL GAS COMPANY,
Respondents

No. 47

SOUTHERN CALIFORNIA GAS COMPANY AND SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, *Petitioners*

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, EL PASO NATURAL GAS COMPANY,
Respondents

No. 57

FEDERAL POWER COMMISSION, *Petitioner*

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, EL PASO NATURAL GAS COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT BRIEF FOR RESPONDENTS

Come now Lo-Vaca Gathering Company (Lo-Vaca), Houston Pipe Line Company (Houston), and El Paso Natural Gas Company (El Paso). Respondents herein and file this Joint Brief in Cases Nos. 46, 47, and 57.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 323 F.2d 190 (5th Cir. 1963). It is set forth in the Transcript of Record herein on pages 365-376. The order of the Court below denying petitions for rehearing and the Commission's motion for rehearing *en banc* is set forth in the Transcript of Record herein on pages 377-379. The opinion and orders of the Commission (R. 1100-1113, 1184-1185) are reported at 26 F.P.C. 606 and 840 (1961).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioners' briefs.

QUESTION PRESENTED

Is a separately identifiable sale of natural gas, restricting use for the purchaser's own consumption or for consumption in intrastate commerce, converted into a sale in interstate commerce for resale by reason of commingling by the purchaser with other supplies to be resold in interstate commerce despite operation of buyer's pipeline system enabling proportional separation from the mixture of restricted-use volumes at designated points of consumption?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in the appendix to this brief.

STATEMENT

The Court below reversed a Commission decision which held that proposed sales by Lo-Vaca and Houston would be subject to its jurisdiction under Section

1(b) of the Natural Gas Act. In reaching its conclusion, the Court followed the consistent rationale of all other cases which have dealt with the issue here involved, holding that a separately identifiable sale of natural gas for consumption by the purchaser or for consumption in intrastate commerce is not changed into a sale for resale in interstate commerce because of commingling by the purchaser with other supplies to be resold in interstate commerce.

The evidence shows that the Lo-Vaca and Houston transactions precisely fit the rationale announced by this Court in *United States* v. *P. U. C. of California*, 345 U.S. 295 (1953) and applied in *City of Hastings* v. *F.P.C.*, 221 F.2d 31 (D.C. Cir. 1954); *North Dakota* v. *F.P.C.*, 247 F.2d 173 (8th Cir. 1957), and *Amerada Petroleum Corp.* v. *F.P.C.*, 334 F.2d 404 (8th Cir. 1964). Their transactions, which restricted the use of the gas by El Paso either for its own consumption or for consumption in intrastate commerce, were separate in all respects from any jurisdictional sales. Faithful to the earlier opinions, Lo-Vaca and Houston demonstrated the separate identities of their restricted-use transactions through proof of separate negotiations, separate contracts, separate metering, separate reserves, separate billing, and separate delivery points, (R. 21-26, 35, 64-65, 107, 216, 257, 821-845, 416-459).

The Lo-Vaca Transaction

Pursuant to a contract dated March 15, 1960, Lo-Vaca agreed to sell to El Paso 50,000 Mcf of natural gas per day for delivery to El Paso's affiliate, El Paso Gas Supply Company, at the Coquat Compressor Station near Three Rivers in Live Oak County, Texas. This contract, which we shall term Lo-Vaca's re-

stricted-use contract, expressly restricts the use of the gas by El Paso as follows (R. 842):

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

On May 16, 1960, Lo-Vaca and El Paso entered into a second contract providing for the sale of another 50,000 Mcf per day.[1] This contract also provided for delivery at the Coquat Station. It did not, however, contain any restriction as to use by El Paso. This unrestricted contract is not directly involved here. However, reference to this transaction, when considering the pertinent elements of the restricted-use sale, will demonstrate how effectively Lo-Vaca has maintained the separated identity of the restricted-use sale and has met the requirements of the court decisions.

In *United States* v. *P.U.C. of California*, 345 U.S. 295 (1953), this Court signaled the importance in determining Commission jurisdiction over a sale in one state for direct consumption by the purchaser in another state, when commingling by the purchaser is involved, by stating (345 U.S. at 318):

> "It may be that as an engineering proposition, accurate measurement of the volume resold and the volume directly consumed by the two parties is possible for each billing period. But there is no record evidence of separate rates, separate negotiations, separate contracts or separate rate regula-

[1] Later, this contract was amended to provide for delivery of 80,000 Mcf of natural gas per day (R. 490-491).

> tion by official bodies, in short that the 'sales' themselves were separate, and it is in these terms that the Act would require us to fix the limits of the jurisdictional grant." (Footnote omitted.)

Lo-Vaca went beyond this indicated requirement to assure that its restricted-use transaction would be entirely separate from the unrestricted transaction or any other sale to El Paso. Thus, many aspects of the restricted-use transation illustrate its separate nature. Separate reserves under contract with producers in the Texas Gulf Coast Area are dedicated to be used solely in satisfaction of the restricted-use sale (R. 25-26, 64-65, 216, 875). The delivery point and the metering of the restricted-use gas at Coquat Station will be separate from the non-restricted gas or from Houston's gas which would also be delivered at Coquat Station (R. 35, 257). This separate metering will assure accurate measurement of the restricted-use volumes prior to commingling in El Paso's facilities.

As a further demonstration of the separate nature of the restricted-use transaction the record shows that negotiations for this sale were entirely separate from the negotiations leading up to the unrestricted sale (R. 25). Thus, Lo-Vaca and El Paso began negotiations for the restricted-use gas in February, 1960, and executed their separate contract in March 15, 1960. Negotiations on the unrestricted contract did not begin until about the time the restricted-use contract was executed and final agreement was not reached until May 16, 1960 (R. 21-25). Of course, billing will be made separately for gas sold under each contract (R. 835, 868).

On June 1, 1960, Lo-Vaca filed an application for a certificate of public convenience and necessity request-

ing authority to *gather and deliver* to El Paso the gas to be sold under the restricted-use transaction. Lo-Vaca also requested authority to *gather and sell* the gas to be sold under the unrestricted contract. Lo-Vaca sought authority to transport the restricted use gas because such transportation would be in interstate commerce. However, since the restricted-use sale would be a direct sale for El Paso's own use, as distinguished from a sale in interstate commerce for resale, no authorization to make that sale was requested (R. 814-815).

The Houston Transaction

Houston operates an intrastate pipeline system entirely within the State of Texas (R. 104-106, 415). It buys gas from numerous producers in the Texas Gulf Coast area and transports and sells the gas both to city-gate customers and directly to industries (R. 104). It is of particular significance here that many of Houston's gas purchase contracts contain cancellation clauses which require Houston to give notice if it proposes to resell the gas in interstate commerce (R. 109-111, 459). The producers have the right to cancel their contracts and terminate deliveries rather than permit their sales to become sales for resale in interstate commerce (R. 459). These cancellation clauses in the producer contracts are an essential factor in Houston's ability to maintain adequate supplies to serve its intrastate customers in Texas, for many producers will not sell their gas without such a commitment (R. 179).

This background forms the context for Houston's restricted-use sale to El Paso. By a contract dated July 19, 1960, Houston agreed to sell to El Paso 70,000

Mcf of natural gas per day (R. 416-458). Delivery would be made to El Paso Gas Supply Company at the Coquat Station (R. 107, 415). As reflected in the terms of the contract, the parties agreed that El Paso would restrict the use of the Houston volumes to consumption wholly within the State of Texas (R. 421). El Paso would use this gas primarily in its own facilities and a small portion would be consumed in Phillips Petroleum Company's Goldsmith Plant located in Ector County, Texas (R. 421). The contract expressly recognized that construction of separate facilities to transport Houston's gas to the various points of use would be unnecessarily duplicative and economically prohibitive (R. 421). Thus, it provided that the Houston gas could be commingled with other gas in El Paso's system (R. 421).

However, El Paso is obligated to operate its system in Texas so that (R. 422):

> ". . . all components of El Paso's plant consuming fuel gas hereunder shall physically be located on its system of pipe lines and laterals within the state of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downsteam from the originating delivery point defined hereunder. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volume of gas contributed into the commingled stream at Three Rivers by Houston. El Paso agrees to retain for a period of six (6) years and on demand will supply meter reading charts taken from meters at such points as may be necessary to enable proof to be made of the foregoing described continuous flow of gas."

The record shows that El Paso can and will operate its system in compliance with its contract obligation (R. 160-162, 358, 486-489).

Because of the uncertainty arising out of the producers' right to cancel their supply contracts, Houston, on December 27, 1960, filed a Petition for Declaratory Order seeking a ruling from the Commission as to the jurisdictional status of its proposed restricted-use sale (R. 907-927).

El Paso's Operations

El Paso presently operates a natural gas pipeline system extending from gas fields in western Texas to the Arizona-California border where it interconnects with facilities of pipeline companies operating within the State of California (R. 494). It makes numerous sales in the States of Texas, New Mexico, and Arizona as well as delivering its major load at the California border for consumption within that State (R. 485, 489, 494). Furthermore, it has large requirements of its own for natural gas for use in compressor stations, treating plants, boilers, and camps (R. 486, 487).

In order to obtain the supplies from Lo-Vaca and Houston, El Paso Gas Supply Company proposes in Docket No. CP60-101 to construct and operate a 30-inch transmission main from Three Rivers in Live Oak County, Texas, to El Paso's Sonora Gasoline Plant in Sutton County, Texas (R. 494).

Additionally, in order to assure operation of its system in the manner required by the restricted-use contracts with Lo-Vaca and Houston, El Paso will construct numerous facilities at a total cost of approximately $253,000 (R. 1105). Furthermore, it proposes

to construct a new 16-inch pipeline extending approximately 211 miles from its Keystone Compressor Station to El Paso, Texas, all within the State of Texas.[2] This facility would be used, in part, to carry Houston's restricted-use gas to points of consumption in Culberson and Hudspeth Counties, Texas, without the injection of any out-of-state gas and without having the Houston gas leave the State (R. 485).

After separate metering and delivery, the supplies delivered by Lo-Vaca under both of its contracts and by Houston will be commingled at the Coquat Station in the Supply Company's facilities (R. 35, 257, 139-140, 485). The commingled stream will be transported northwesterly to El Paso's system at the Somora Plant in Sutton County, Texas (R. 140, 485). At that point the Lo-Vaca and Houston gas will be further commingled with other El Paso supplies also originating in Texas (R. 140, 485).

However, from the common stream El Paso will, at all times, utilize for fuel for its plants in Texas and for the Phillips Goldsmith Plant in Texas an amount in excess of the amount purchased from Houston (R. 128, 343). At all times, also, El Paso will consume from the commingled stream in its plants outside Texas an amount in excess of the amount purchased under the Lo-Vaca restricted-use contract (R. 486-487). Fuel uses at all of the plants will be separately metered to assure accurate delivery of volumes at least equal to

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[2] El Paso requested certificate authorization for this line in Docket No. G-18616 which was pending at the time of the Commission's decision below. Although the application in Docket No. G-18616 has been subsequently withdrawn without prejudice, it is assumed for the purposes of the Commission's decision that the facilities would be constructed (R. 1105). (See F.P.C. Br. p. 9).

those purchased under the restricted-use contracts (R. 343). El Paso will, at all times, regulate its takes from Lo-Vaca and Houston to assure that its purchases from neither exceeds the quantities it consumes in the manner outlined above (159, 266-267, 272, 307, 488, 489).

By proportional separation of the restricted-use volumes from the commingled stream at the designated points of consumption, made possible by El Paso's operation of its system facilities, the purpose of the sales will be effected.

Despite this evidence which shows that the Lo-Vaca and Houston restricted-use transactions are entirely separate from any jurisdictional transactions and despite evidence of the operations of El Paso's system demonstrating the manner in which the volumes of restricted-use gas will reach their intended points of consumption, the Commission held both sales to be sales in interstate commerce for resale.

The Commission held, in a complete reversal of its position in earlier cases, that commingling did alter the nature of the Lo-Vaca and Houston sales (R. 1100-1113). It claimed that the presence of molecules of the gas delivered to El Paso by Lo-Vaca and Houston at destinations where El Paso makes resales would be the controlling factor (R. 1110-1111). Reduced to its essentials, the Commission's conclusion is simply that *all* sales, regardless of the separateness of transactions, into a commingled stream are sales in interstate for resale, if a portion of the commingled stream is resold in interstate commerce (R. 1110, 1185).

In reaching this result the Commission ignores both the court-approved separability of transactions test set forth in *United States* v. *P.U.C. of California*, 345

U.S. 295, 318 (1953) (*infra*, pp. 18-20) and the consequences of the fungible nature of natural gas which permits proportional separation by volume (*infra*, pp. 28-35).

The Court below, in reversing the Commission, held that commingling of gas does not destroy the separate nature of the restricted-use transactions. Importantly also, the decision below held that since gas is a fungible commodity the parties can effect proportional separation by volume, a practice which has been recognized by the courts and which is a common practice in transactions involving other fungible commodities (*infra*, pp. 32-35).

SUMMARY OF ARGUMENT

Lo-Vaca and Houston propose to make sales to El Paso of Texas-produced gas pursuant to transactions which restrict the use of Lo-Vaca's gas to El Paso's own consumption in New Mexico and Arizona and restrict use of Houston's gas to consumption within the State of Texas (R. 422-842). Lo-Vaca and Houston have carefully tailored their restricted-use transactions so that each is essentially separate from any other transaction and neither involves the sale of any gas for resale in interstate commerce. (Transcript of Record, p. 368).

Lo-Vaca and Houston realized that the only practical course would be for El Paso to commingle the restricted-use volumes with other volumes in its pipeline system (R. 422, 842). Since Lo-Vaca and Houston are selling a fungible commodity, physical commingling of the molecules of gas delivered under their restricted-use contracts with other gas in El Paso's system will have no effect upon their separate transactions. Of course, El Paso will operate its sys-

tem in accordance with its contract, at all times, so that by proportional separation at the points of restricted use, it will always utilize volumes equal to or in excess of the volumes which it purchases pursuant to the restricted-use sales. By this means of physical operation El Paso will assure that no volumes purchased under either of the restricted-use sales will be resold or consumed in violation of its contractual commitment (R. 358, 486, 487).

In ruling upon facts indistinguishable from these, the courts have consistently held that physical commingling by the purchaser does not convert a separate nonjurisdictional sale into a sale for resale in interstate commerce. *United States* v. *P.U.C. of California*, 345 U.S. 295 (1953); *City of Hastings* v. *F.P.C.*, 221 F.2d 31 (D.C. Cir. 1954) *cert. denied*, 345 U.S. 420 (1955); *North Dakota* v. *F.P.C.*, 247 F.2d 173 (8th Cir. 1957); *Amerada Petroleum Corp.* v. *F.P.C.*, 334 F.2d 404 (8th Cir. 1964). These cases hold that parties may effect proportional separation of their volumes from the commingled stream and their separate restricted-use transactions do not become subject to Commission jurisdiction. Such a rule gives full effect to the jurisdictional grant of Section 1(b) of the Natural Gas Act while at the same time assuring that Commission regulation is not imposed upon any separate transactions which do not involve sales in interstate commerce for resale. *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507 (1947); *United States* v. *P.U.C. of California*, 345 U.S. 295 (1953).

Significantly, in the daily administration of the Natural Gas Act the Commission, itself, recognizes the reality of proportional separation by volume and an

important segment of the business of interstate transportation of natural gas is dependent upon this fundamental consequence of fungibility. Thus, substantial volumes are transported daily, with Commission approval, where gas is injected into the commingled stream for redelivery, by volume, at another point closer to markets. *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (see, *infra*, pp. 28-32; Appendix pp. 4a-7a).

Moreover, proportional separation by volume makes sound economic sense, for in dealing with natural gas or any other fungible commodity any decision negating such a rule would require resort to elaborate and expensive alternatives or totally discourage many commercial transactions which are plainly in the public interest. *Cf. Munn* v. *Illinois*, 94 U.S. 113 (1876); *Federal Tender Board No. 1* v. *Haynes Oil Corporation*, 80 F.2d 468 (5th Cir. 1935); *Central States Corp.* v. *Luther*, 215 F.2d 38 (10th Cir. 1954) *cert. denied*, 348 U.S. 951 (1955).

Petitioners contend that these long-standing legal and business principles should not apply since by reason of commingling some molecules of the gas delivered by Lo-Vaca and Houston may physically reach points of consumption in California. Petitioners, of course, do not deny that if Respondents were to construct entirely separate facilities from the Coquat Station to the points of restricted use, Commission jurisdiction over the restricted-use sales could not be asserted. Neither do they contend that Lo-Vaca and Houston have not successfully maintained their restricted-use transactions completely separate from any other transaction pursuant to which El Paso buys or sells gas. Further, there is no contention that Lo-Vaca, Houston,

and El Paso will not conduct their operations to make the proportional separation of the restricted-use volumes possible at all times.

Thus, Petitioners are reduced to a contention that the court-approved rationale, which gives effect to a standard commercial practice, should be reversed. They argue, in effect, that El Paso does not purchase a stated volume of gas, a fungible commodity, but that El Paso purchases specific molecules whose separate physical identity should be controlling.

This position represents a complete departure from the position the Commission has taken prior to the Lo-Vaca and Houston proceedings and is entirely inconsistent with its treatment in analogous transportation cases.

Petitioner's position simply cannot be reconciled with the rationale of *United States* v. *P.U.C. of California*, 345 U.S. 295, 318 (1953) nor the holdings in *City of Hastings* v. *F.P.C.*, 221 F.2d 31 (D.C. Cir. 1954); *North Dakota* v. *F.P.C.*, 247 F.2d 173 (8th Cir. 1957), and *Amerada Petroleum Corp.* v. *F.P.C.*, 334 F.2d 404 (8th Cir. 1964). And reliance upon language taken out of context from *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 529 (1945) is misplaced. For that decision makes it plain that Congress did not make Commission authority coextensive with the scope of Congressional power over interstate commerce. Instead, the Act restricts Commission authority over sales to sales in interstate commerce for resale—a legal limitation, not an engineering test.

Other cases cited by Petitioners are likewise not in point. Thus, *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414 (1952) and *F.P.C.* v. *Southern*

California Edison Co., involved admitted sales for resale under which some out-of-state energy was sold. Proportional separation by volume and the separability of transactions test were not involved. Similarly, cases cited by Petitioners relating to the scope of interstate commerce such as *Deep South Oil Co.* v. *F.P.C.*, 247 F.2d 882 (5th Cir. 1957) and *Interstate Natural Gas Co.* v. *F.P.C.*, 331 U.S. 682 (1947) are inapposite. And since Lo-Vaca and Houston intend to make restricted-use sales and the parties will conduct their operations so that their intentions are effectuated, cases involving an expressed intent contrary to the real purpose of the parties are of no value here. See, *Baltimore & O.S.W.R. Co.* v. *Settle*, 260 U.S. 166 (1922).

Finally, the decision below will not open a regulatory gap which the Natural Gas Act intended to close. The line of the statute, which was drafted in precise terms of the regulatory gap which existed prior to passage of the Act, cut "sharply and cleanly" between sales for resale in interstate commerce which were beyond state power and direct sales for consumptive uses in interstate commerce and sales in intrastate commerce which were subject to state power. *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507, 517 (1947); *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964). Commission jurisdiction does not arise, as contended by Petitioners, because they believe that the State of Texas has no interest in regulating sales to El Paso for its own consumption or for consumption in Texas. For the test of the Act is not a case-by-case balancing of national versus local interest.

Furthermore, under Section 7 of the Act the Commission may regulate many aspects of the proposals now before it including certification of producer sales to Lo-Vaca, and the construction and operation of facilities by Lo-Vaca and El Paso. Such authority assures federal regulation of the transactions in the manner prescribed by the Natural Gas Act.

ARGUMENT

I.

THE COURT BELOW CORRECTLY INTERPRETED APPLICABLE LAW.

The starting point for determination of Commission jurisdiction over the Lo-Vaca and Houston restricted-use sales necessarily is Section 1(b) of the Natural Gas Act which provides, in pertinent part, as follows:

> "The provisions of this act shall apply to * * * the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, * * * but shall not apply to any other * * * sale of natural gas . . . ." [52 Stat. 821 (1938; 15 U.S.C. § 717(b)]

This statutory limitation of Commission jurisdiction has been definitively interpreted in *Panhandle Eastern Pipe Line Co.* v. *P.S.C of Indiana*, 332 U.S. 507 (1947) where this Court held (332 U.S. at 517):

> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale [in interstate commerce] and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed."

Thus, if, as the Court below found, the Lo-Vaca sale is a direct sale for El Paso's consumption and Houston's sale is not in interstate commerce, the restricted-use sales fall on the nonjurisdictional side of the statutory line which grants to the Commission jurisdiction over only one kind of sale—a sale in interstate commerce for resale.

Application of Section 1(b) in the context of these proceedings is highlighted by the lower Court's observation that if El Paso were to construct separate facilities carrying only the restricted-use gas to the designated points of consumption, unquestionably the sales would not be jurisdictional. Lo-Vaca's sale would be a direct sale in interstate commerce for El Paso's own consumption and Houston's sale for consumption in Texas would be in intrastate commerce.

In circumstances such as these, the courts have consistently held that the mere fact of commingling by the purchaser does not convert a separate nonjurisdictional transaction into a jurisdictional sale. *United States* v. *P. U. C. of California*, 345 U.S. 295 (1953); *City of Hastings* v. *F.P.C.*, 221 F.2d 31 (D.C. Cir. 1954) *cert. denied*, 345 U.S. 420 (1955); *North Dakota* v. *F.P.C.*, 247 F.2d 173 (8th Cir. 1957); *Amerada Petroleum Corp.* v. *F.P.C.*, 334 F.2d 404 (8th Cir. 1964). The courts have held, without exception, that if the nonjurisdictional transaction is entirely separate from jurisdictional transactions involving gas in the commingled stream, the parties may effect a proportional separation of their volumes from the commingled stream and their separate restricted-use transactions do not become subject to Commission jurisdiction. This practice corresponds with the Commission's own action in administration of the Natural

Gas Act in other cases involving commingling and proportional separation and gives effect to standard commercial practice in dealing with fungible commodities.[3]

A. Proportional Separation By Volume and Determination of Jurisdiction By Separability of Transactions Test Conform to Statutory Scheme

All pertinent cases which have interpreted the scope of the Commission's jurisdiction under Section 1(b) demonstrate that physical commingling by the purchaser is not sufficient in itself to give the Commission jurisdiction over otherwise nonjurisdictional transactions. Also, implicit in these cases is the recognition that parties may effect a proportional separation by volume from the commingled stream for a particular purpose. Thus, the rationale of law is to preserve the consequences of fungibility, and where a separate nonjurisdictional transaction is identifiable Commission jurisdiction is denied.

United States v. *P.U.C. of California*, 345 U.S. 295 (1953) sets forth the controlling rationale. There this Court made it clear that physical identification and tracing of a fungible commodity, electricity, is immaterial if the parties have entered into separately identifiable transactions covering the jurisdictional and nonjurisdictional sales. In that proceeding the Public

[3] In its Forty-Second Annual Report for the Fiscal Year ended June 30, 1962, the Commission reported its Lo-Vaca opinion under a heading entitled "New Regulatory Policies" (see, pp. 23-25). Such a classification as a new policy was obviously accurate for the Commission had espoused the separability test in denying jurisdiction in *City of Hastings* v. *F.P.C.*, 221 F. 2d 31 (1954) and *North Dakota* v. *F.P.C.*, 247 F. 2d 173 (1957). See, *infra*, pp. 21-24.

Utilities Commission of California had sought to assert jurisdiction over a sale of electricity by California Electric Company to the U.S. Navy. The sale, under a single contract making no provision as to use, took place in California where delivery was made to the Navy. After receipt, the Navy transmitted the energy across the state border into Nevada where a minor percentage was resold in a housing development, but the major portion was consumed by the Navy itself in its own industrial operations.

Because of the lack of a separately identifiable transaction covering the sale to the Navy for its own use, this Court denied California's jurisdiction over the sale of the portion of the electricity which the Navy consumed in its own installation, stating (345 U.S. at 318):

> "It may be that as an engineering proposition, accurate measurement of the volume resold and the volume directly consumed by the two parties is possible for each billing period. But there is no record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the 'sales' themselves were separate, and it is in these terms that the Act would require us to fix the limits of the jurisdictional grant." (footnote omitted).

In the absence of evidence showing that the sale to the Navy for its own use was separate from the sale for resale the Court did not decide the question whether the parties could meet the test of separability of transactions. But implicit in its reasoning is the assumption that if such separability were established the direct

sale in California for the Navy's own use in Nevada would not be subject to federal regulation.[4]

Yet, it is obvious, as admitted by the Commission (F.P.C. Br. p. 28), that commingling of the energy for the Navy's own use with the resale energy would necessarily mean that some portion of the energy actually delivered under the nonjurisdictional direct sale contract would be delivered to the housing development for resale, to be replaced by equal portions of energy actually delivered under the resale contract.

Plainly, if molecular identity at points of consumption had been the determining factor, the Court would not have concluded that when commingled energy is involved the determination of jurisdiction "would turn, of course, on whether an *essentially separate transaction* covering the power directly consumed by the purchaser is identifiable." (345 U.S. at 318, emphasis applied.)

Subsequent to the California case, other decisions have held the rationale of "essentially separate transactions" of fungible commodities to be determinative of Commission jurisdiction. Significantly, in the *California* case itself the Court noted that the Commission was then considering the effect of the "separability of transaction test" in *City of Hastings* v.

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[4] Interestingly, California in its brief here argues that if the power company had entered into a separate transaction covering the sale to the Navy for its own use in Nevada, California would have had jurisdiction over such sale taking place within its own borders. (See, Cal. Br. pp. 24, 31) By parity of reasoning it is equally true that the separate transaction involving the sale by Lo-Vaca to El Paso for consumption in other states is not subject to federal regulation but falls within the scope of state power (see, *infra*, pp. 42-46).

Kansas-Nebraska Natural Gas Co., 12 F.P.C. 12 (1953). It was the Commission's denial of jurisdiction in that case on the ground that the parties had entered into a separate contract for the nonjurisdictional sales which was later affirmed in *City of Hastings* v. *F.P.C.*, 221 F.2d 31 (D.C. Cir. 1954).

In the *Hastings* case, Kansas-Nebraska Pipeline Company sold gas to the City of Hastings under two separate contracts. One contract covered gas to be used by the City in its power plant in generating electricity. The other covered gas to be resold to consumers in the City. Delivery was made in one commingled stream at the city gate. After delivery, gas sold under both contracts was transported still in a commingled stream by the City to points of use or resale. The existence of "essentially separate transactions", one involving a direct sale to the City for its own use in the power plant and the other involving the sale for resale, were definitively established by the "entire course of dealings [which] clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocation of gas and effective separate measurement facilities." (Footnote omitted; *Id.*, at 36.)

If the Commission's newly espoused theory of physical identification and tracing of molecules from points of delivery to points of use had been applied in the *Hastings* case, the direct sale to the City for power plant use would necessarily have been held to be a sale for resale in interstate commerce. For it is undeniable that some of the molecules of the gas delivered by Kansas-Nebraska Pipeline Company at the city gate for use in the City's power plant would, because of

commingling in the City's facilities with resale gas, be delivered to the points of resale. Yet, because of the proportional separation, by volume, of the gas sold under the separate direct-use transaction, the Court held that the power plant sale did not constitute a sale for resale within the meaning of Section 1(b) of the Act. Effectievly, the Court held, as did the Court below (Transcript of Record, p. 372) that the restricted-use gas was *not* resold in interstate commerce.[5] Obviously, identity of molecules of gas sold under each contract and resold at the points of use had no significance.

North Dakota v. *F.P.C.*, 247 F.2d 173 (8th Cir. 1957) applied the same controlling rationale. There two producers which gathered gas from many sources sold the gas under four separate contracts to Montana-Dakota Pipeline Company at the outlet of the Tioga Plant in North Dakota. Each producer agreed to sell 16-cent "firm" gas to Montana-Dakota for resale in four communities in North Dakota. The remainder of the gas delivered was to be at 9 cents per Mcf under so-called "dump" gas contracts for interstate use. The dump gas and the firm gas were commingled in Montana-Dakota's line running westerly into Montana.

Only a small proportion of the commingled stream in Montana-Dakota's line could be attributed to the firm intrastate contracts. Some of the molecules of gas delivered to Montana-Dakota at the tailgate of the Tioga Plant for use in North Dakota were, in fact,

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[5] Petitioners claim that the La-Vaca and Houston gas would be resold in California (F.P.C. Br. p. 9; Cal. Br. pp. 18-19; S. Cal. Br. 45). Of course, their argument begs the question. It is in direct conflict with the effective holding of the courts in the *City of Hastings*, *North Dakota*, and *Amerada* cases.

physically delivered into Montana and molecules of gas delivered under the dump gas contracts were physically delivered to the four communities. Yet the holding of the Court, consistent with the rationale of the *California* and *Hastings*, cases was that the gas sold by Amerada and Signal under their firm intrastate contracts was not resold in interstate commerce.[6]

The Court, agreeing with the Commission, found that the "quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' contracts are easily identifiable and determinable." Because it was dealing with a fungible commodity in which physical identity of specific molecules is immaterial, the Court recognized that the parties sold "quantities" of gas, not specific molecules (247 F.2d at 177). In such circumstances, jurisdiction turned, as this Court had forecast in the *California* case, upon whether the quantities of intrastate "firm gas" were sold under transactions which were essentially separate from

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[6] The total irrelevance of Petitioner's molecular identification theory to this type of situation is emphasized by reference to specific facts in the *North Dakota* case. Thus, during 1956 the two producers, Amerada Petroleum Corporation and Signal Oil and Gas Company delivered a total of approximately 6,867,270 Mcf into the commingled stream at Tioga. Of this amount, 11,120 Mcf was delivered under the firm gas contracts to the four communities in North Dakota. Signal's portion of this firm gas delivered at the Tioga Plant and attributed to use by the four communities was only 1,668 Mcf. Thus, Signal's 1,668 Mcf of firm gas was commingled with 6,865,602 Mcf of gas sold under other contracts, and most of this gas (6,856,150 Mcf) was interstate "dump" gas sold by the two producers. It cannot be denied that, because of commingling, some and perhaps all, of the molecules of Signal's 1,668 Mcf of firm gas delivered to Montana Dakota at the Tioga Plant found their way into Montana.

transactions involving the sale of interstate "dump gas".[7]

Petitioners try vainly to avoid the impact of the rationale in the *California, City of Hastings*, and *North Dakota* cases, by suggesting that they should be distinguished from the facts here because in those cases the gas or electricity for the restricted use came from the same source as that sold without restriction (F.P.C. Br. pp. 27-34; Cal. Br. pp. 22-29). Demonstrably, such a distinction is without merit.

In the *California* and *Hastings* cases, where both the gas or electricity sold under the jurisdictional and nonjurisdictional contracts came from a single seller, the volumes sold under each contract were physically commingled by the purchaser after the sale so that molecules sold under the nonjurisdictional contract

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[7] The rationale of the Court in the *North Dakota* case is well illustrated by the Commission's own statement urging the result reached. (Brief of Respondent, Federal Power Commission, No. 15669, United States Court of Appeals, Eighth Circuit, dated January 1957, p. 10):

> "For those decisions [the *California* and *City of Hastings* cases] make plain that the indistinguishable commingling of jurisdictional and non-jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. *In every case* where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale, with other gas (or electricity) not delivered in interstate commerce or not for resale, it is necessary for the Commission to determine 'whether [or not] an essentially separate transaction [for the nonjurisdictional delivery] . . . . is identifiable.' *United States* v. *P.U.C. of California*, 345 U.S. 295, 318. The decisions spell out the principle upon which the Commission here rightly concluded that the transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate." (Emphasis supplied.)

would be mixed with the molecules sold under the jurisdictional contract and physically would reach points of resale. Physical commingling requires this result whether there be one "source" or many for the very concept of commingling connotes mixture. Thus, if the controlling consideration, were, as argued by Petitioners, that the existence of molecules delivered under a restricted-use contract at points of unrestricted use converts the restricted-use sale into an unrestricted-use sale, then application of such a theory in the *Hastings* and *Californias* Cases would have required assertion of jurisdiction despite existence of separate transactions.[8]

Nonetheless, Petitioners persist in their contention that the existence of a single source for restricted-use and unrestricted-use volumes enables proportional separation which would not be possible if the commingled stream contained supplies from additional sources (F.P.C. Br. pp. 27-34; Cal. Br. pp. 25-29). Of course, if proportional separation from a commingled stream is possible when the stream contains gas from one seller under two contracts, proportional separation is no less possible if other sellers add to the commingled stream. However, Petitioners' theory fails for yet another reason. The *North Dakota* case, which Petitioners refer to as an example of their one source theory, in fact involved many sources. And even if the several sources are considered to be reduced by commingling in the Tioga Plant there remain at least two sources or sellers. Gas attributed to Signal's sale for resale in North Dakota need not necessarily have been

[8] Respondents recognize, of course, that in the *California* case the lack of separate transactions required assertion of jurisdiction over the single sale covering both the resale energy and the direct sale energy.

delivered under either of Signal's contracts. Because of commingling with Amerada's gas, some of the molecules actually derived from Amerada. Clearly Petitioners' "one source" theory does not even apply in the case from which it is purported to be taken.

The fallacy of Petitioners' argument is emphasized by the sequel to the *North Dakota* case recently decided, *sub nom., Amerada Petroleum Corp.* v. *F.P.C.*, 334 F.2d 404 (8th Cir. 1964). There, Amerada and Signal proposed to sell additional volumes to Montana-Dakota for intrastate use and also to increase the volumes which Montana Dakota would resell in interstate commerce. The producers requested certificates for the sales relating to the interstate contracts but did not request authorization for the sales of additional volumes to be resold in the State of North Dakota. As was true in the *North Dakota* case, the volumes of intrastate gas sold by Amerada and Signal would be commingled in Montana Dakota's pipeline with the interstate gas. One additional feature was added which the Commission seized upon as distinguishing the sequel from its predecessor. This new fact was the injection of additional supplies by other producers into the commingled stream. These new producers sell their gas to Montana-Dakota under unrestricted contracts, their sales being sales for resale in interstate commerce.

The Commission claimed that the addition of these new supplies changed the Amerada and Signal intrastate sales into sales in interstate commerce for resale.

In reversing the Commission, the same Court which had decided the *North Dakota* case held that the addition of a new source of gas into the commingled stream

has no legal significance. The Court pointed out that in the *North Dakota* case all of the gas had not originated from one source but instead had come from several sources. Therefore, the addition of another source in the *Amerada* case could have no new significance.

The Court then penetrated to the core of the Commission's argument by making it clear that the number of sources plays no part in jurisdiction over the sale. Thus, it held (334 F.2d 410-411):

> "The fact remains that the controlling issue is not the point of entry into MDU's pipeline of the destined intra and interstate gas whether both classes of gas are derived from one or several sources. It is the validity of division by contract and volume of interstate sales of gas confessedly subject to federal regulation from asserted non-jurisdictional gas produced and sold in the same state, both transactions remaining unaffected by the fact that common transportation facilities are shared en route to their intended destination. If the commingling of the interstate and intrastate gas in the former case [the *North Dakota* case] did not deprive the state of regulatory jurisdiction, then the mere induction of additional interstate gas from other sources would not have that effect now. Admittedly, if the North Dakota Contract gas [the intrastate gas] was conveyed by separate pipeline the Commission would concede its lack of jurisdiction. We cannot fashion our decision on such an onerous and illogical result that would necessitate the building of a parallel pipeline with its attendant expense, inevitably to be borne by the rate payers, to say nothing of the waste of natural resources during the interim."

B. Proportional Separation by Volume and Determination of Jurisdiction by Separability of Transactions Test are Standard Criteria Utilized in Administration of Natural Gas Act.

It is apparent from the foregoing cases that the courts have recognized the standard business practice of proportional separation by volume, the consequence of fungibility, when considering the jurisdictional nature of a sale of natural gas. From this basic premise they have then sought to determine whether the restricted-use sale constitutes a separate transaction relating only to the gas sold for the nonjurisdictional purpose. If this separability test is satisfied, Commission jurisdiction does not attach.

Significantly, this rationale conforms with the regular practice of the Commission itself in its daily administration of the Natural Gas Act. Thus, an important segment of the natural gas industry relies upon these concepts, for in all transportation arrangements where any transportation gas is commingled with gas sold under resale contracts, the validity of proportional separation by volume is assumed.

These transportation arrangements are illustrated by the decision in *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). In that case, Transcontinental sought a certificate authorizing the transportation of gas for Consolidated Edison Company from Texas to New York City. Consolidated Edison had entered into gas purchase contracts with several producers and proposed to take delivery in the field. Consolidated Edison would then deliver its gas to Transcontinental under a transportation agreement whereby the interstate pipeline company would carry the gas in its pipeline system to New York City for redelivery to Consolidated Edison.

It is significant that this Court, and the Commission itself, readily recognized that the producers' sales to Consolidated Edison for its own use in another state would not be subject to Commission jurisdiction because they were not sales for resale (365 U.S. at 23-24). At the same time it was contemplated that Consolidated Edison's gas would be commingled in the pipeline with other supplies which were to be resold so that physical identity of the molecules delivered by Consolidated Edison to Transcontinental could not be traced.[9] The basic premise in the Court's determination is inescapable: Consolidated Edison and Transcontinental could effect a proportional separation of transportation volumes under a separately identifiable transportation agreement.[10]

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[9] The transportation gas would, of course, be commingled with supplies from numerous sources, not just one, so that it is obvious that the Commission's "single source" theory is equally as inapplicable to this type of transaction as it is in the case of restricted-use sales. (See, *supra*, pp. 25-27).

[10] In its brief the Commission suggests that the transportation arrangement might be treated as three unrestricted sales—one by the producers to Consolidated Edison, a second by Consolidated Edison to Transcontinental, and finally, a third by Transcontinental back to Consolidated Edison. Aside from the fact that there is no evidence upon which to base such an assumption, it should be sufficient to note that this strained interpretation was not indulged in by the Commission in its opinion in this case, for it expressly recognized the proportional separation effected by transportation arrangements and stated that "It is not our intention by this opinion to disturb such transportation arrangements." (R. 1107).

Plainly, since the interpretation now advanced in the appellate *post hoc* rationalization played no part in the Commission's decision, it cannot now be considered as basis for supporting the decision which the Commission did make. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962).

In a further attempt to avoid the impact of the *Transcontinental* case, the Commission suggests that jurisdiction over the producers'

Other cases further illustrate the importance of proportional separation by volume in administration of the Act. For the Commission has authorized the construction and initial operation of major interstate pipeline systems which are dependent, in significant part, upon transportation arrangements permitting nonjurisdictional sales at one end of the sysem and proportional separation of transportation volumes at the other end. See, *e.g., Houston Texas Gas & Oil Corp.*, 16 F.P.C., 118 (1956), affirmed *sub nom. Florida Economic Advisory Council* v. *F.P.C.*, 251 F.2d 643 (D.C. Cir. 1957) *cert. denied*, 356 U.S. 959 (1958), where three-fifths of the initial system capacity was dedicated to transportation of gas purchased in Texas by electric power companies in Florida (16 F.P.C. at 121-122). See also, *Trans-Continental Gas Pipe Line Co., Inc.*, 7 F.P.C. 24, 29, 34 (1948).

Although the *Transcontinental* and *Houston Texas Gas & Oil Corp.* cases discussed above are remarkable examples, the Commission regularly approves numerous transportation agreements which are dependent upon the same concept of proportional separation by volume. Thus, many of the major pipeline companies

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sales to Consolidated Edison was not in issue and therefore the Commission did not give consideration to this aspect (F.P.C. Br. p. 21). Such a contention is hardly plausible in view of the fact that a major issue in certification of the transportation service was the effect the producers' prices would have upon other prices in the area (365 U.S. 1, at 23-24). Certainly, unless the Commission had assumed that it had no jurisdiction over the producers' sales there would have been no need for basing denial of the transportation certificate on the ground that the producers' prices might have an adverse effect upon the public interest. The Commission could have directly controlled the producer prices and thereby avoided the question of its indirect power through control of the certificate issued to the pipeline.

have transportation rate schedules on file with the Commission pursuant to which they transport gas for others.[11] The function of these transportation agreements, and the concomitant proportional separation of transportation volumes, finds its origin in the basic needs of the industry. Typically, a company, in many cases a pipeline company, may have a source of gas not closely connected to its system or market. The gas may be brought to its system either through construction of substantial and costly facilities or it may be transported by a pipeline already in the area to some point where the two pipeline systems cross or where the market exists. Obviously, economy dictates the choice of the latter alternative. Obviously, also the same basic fact underlies the negotiation of the Lo-Vaca and Houston restricted-use sales.

But recognition of the legal consequences of fungibility and application of the separability of transactions test has not been limited to transportation arrangements. In addition to the *California, City of Hastings, North Dakota*, and *Amerada* cases discussed above (supra, pp. 18-27) which bear directly upon this issue, the Commission has applied the same rationale in other instances. For example, in *Colorado Interstate Gas Co.*, 19 F.P.C., 1012 (1958) the Commission held that a sale of gas flowing into a commingled stream could be changed from jurisdictional to non-

[11] The Annual Reports (Form 2) filed for natural gas pipeline companies covering operations conducted in the year 1963 show transportation deliveries of approximately 1,552,118,382 Mcf, large amounts of which were transported in commingled streams. There is set forth in the appendix hereto a listing of some of the more significant of the transportation arrangements which do involve commingling and proportional separation.

jurisdictional by the negotiation of a separate transaction covering a sale for consumption by the purchaser (*Id.*, at 1022). Another example is contained in *Shell Oil Co.*, 25 F.P.C., 1316 (1961), decided shortly before this case, in which a sale of gas for direct consumption by the purchasers was held to be nonjurisdictional despite the fact that it would be transported in a commingled stream with other gas destined for resale in interstate commerce (*id.*, at 1322).

Plainly, proportional separation by volume and the separability of transaction test do not comprise exceptions to the Commission's general practice in administration of the Natural Gas Act. On the contrary, they form an integral part of the statutory scheme in which only sales for resale in interstate commerce would be regulated by the Commission, and all other sales, of whatever sort, would remain subject to state power. *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507, 517 (1947).

C. Proportional Separation by Volume of Fungible Commodities is Standard Business Practice

The practice of the Commission giving effect to proportional separation of commingled volumes of natural gas in transportation cases merely gives due recognition to the standard business practice which prevails wherever commingling of a fungible commodity is involved. As the Court below noted, the "concept of separate identity, by volume, is not new." (Transcript of Record, p. 371). Gas, like oil, grain, coal, or other commodities of the same kind and quality may be mixed so that separate identity of the goods becomes impossible but division can be made of proportional volumes.

Thus, the Court below noted that in the "hot oil" cases it had rejected a contention of the Federal Tender Board which was essentially the same as the molecular identification argument urged by the Commission here (Transcript of Record, p. 371). The fungibility of oil permitted proportional separation by volume of the lawfully produced oil without affecting the contraband oil in the mixture. *Federal Tender Board No. 1* v. *Haynes Oil Corporation*, 80 F.2d 468, 469 (5th Cir. 1935).

Similarly, it has been held that proportional separation of a fungible commodity, oil, is the controlling factor determining whether interstate or intrastate rates apply. *Humble Oil & Refining Co.* v. *Texas & Pacific Railway Co.*, Tex., 289 S.W. 2d 547 (1955).

The concept of fungibility and concomitant proportional separation by volume has been aptly described, as follows [*Gourd* v. *Healy*, 206 N.Y. 423, 99 N.E. 1099 at 1102 (1912)]:

> "* * * Property may be acquired and held in many things which are incapable of more specific designation than a reference to their kind, quality, or other general description. 'Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture or quality.' * * *."

The grain cases involve many examples of application or recognition of the consequences of fungibility. Thus, as early as *Munn* v. *Illinois*, 94 U.S. 113 (1876) the Court noted that the practicalities of business operations make it impossible to preserve each owners grain

physically separate. Accordingly, a mode of conducting business was inaugurated whereby grain of like quality was commingled. Owners were issued receipts which were redeemable in kind (*id.*, at 131). See also, *Central States Corp.* v. *Luther*, 215 F.2d 38, 45 (10th Cir. 1954), *cert. denied*, 348 U.S. 951 (1955) (grain); *United States* v. *Amalgamated Sugar Co.*, 72 F.2d 755 (10th Cir. 1934) (sugar); and *Re Wyoming Valley Collieries Co.*, 29 F. Supp. 106 (M.D. Penn. 1939) (coal).

In another recent natural gas case a separate sale was held to have been effected even though the portion separately sold was, at the time of the sale, in a commingled state with other volumes not covered by the transaction. *Mississippi State Tax Commission* v. *Columbia Gulf Transmission Co.*, 161 So. 2d 173 (Miss. 1964).

Of course, the nature of gas as a fungible commodity and the ability to effect proportional separation of volumes underlies the decision in *Peoples Natural Gas Co.* v. *P.S.C. of Pennsylvania*, 270 U.S. 550 (1926) where this Court held (*id.*, at 554-555):

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course, after the commingling, the two are indistinguishable. But the proportions of both in the mixture are known, and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. The Supreme Court of the state has found that more than enough Pennsylvania gas goes into the mix-

> ture to meet the requirements of the order, and on this basis has construed the order as leaving the company free to deal in usual course with so much of the mixture as represents the gas from West Virginia. * * * In these circumstances the conclusion is unavoidable, we think, that the order does not interfere with or affect the interstate commerce in which the company is engaged."

Plainly, the Commission's molecular identification theory runs counter to the whole stream of law governing commercial practices involving fungible commodities. On the other hand, the decided cases and the Commission's former practice which still pertains with respect to transportation arrangements are consonant with the general business practice prevalent throughout the gas industry and other industries wherever fungible property is involved.

D. Lo-Vaca and Houston Sales Meet the Separability of Transactions Test and El Paso Operations Make Proportional Separation by Volume a Practical Reality.

When the dual principles of separability of transactions and proportional separation by volume are applied to the record facts, it is readily apparent that both Lo-Vaca and Houston propose nonjurisdictional sales and the parties can and will conduct their operations to assure this result.

The separability of the transactions is obvious. Lo-Vaca has dedicated separate reserves for its restricted-use sale (R. 65). Its restricted-use gas will be metered separately from unrestricted gas at separate delivery points (R. 25, 35). The gas sold under the restricted-use sale is the subject of an entirely separate contract which was separately negotiated (R. 821). Billing for

the restricted-use gas will be made separately (R. 835, 863).

Similarly, Houston's transaction for intrastate use will be completely separate from any other sale. The delivery point and metering will be separate from Lo-Vaca's (R. 266). And separate metering at each of the points of intrastate use will preserve the separate identity of volumes (R. 141, 343, 486, 487).

El Paso will continue the separate identification by volume of both the Lo-Vaca and Houston restricted-use gas through metering both at the points of receipt at Coquat Station (R. 266-267) and at the several points of use (R. 343). Moreover, El Paso will, at all times, regulate its takes from Lo-Vaca and Houston to assure that its purchases from neither will exceed the quantities it will consume at the respective points of restricted use (R. 159, 266-267, 272, 307, 486-489). And El Paso will operate its system so that the restricted-use gas can reach the points of restricted use (R. 486-489) thus enabling the proportional separation of the restricted-use volumes. Because of proportional separation from the commingled stream, the Lo-Vaca and Houston sales will not relate to any volumes resold in interstate commerce. Conversely, all volumes resold in interstate commerce by El Paso will relate to gas purchased by El Paso pursuant to unrestricted contracts subject to Commission regulation.[12]

[12] California now appears to contend that El Paso cannot operate its system in the manner which is proposed (Cal. Br. pp. 14-15). Such an argument is belied by the record facts as shown on Exhibit Nos. 7, 8, 9, and 10 (R. 486-489) and the supporting testimony of El Paso's engineering witness. Significantly, the Commission, itself, accepted these facts of El Paso's system operation (R. 1105-1106). Patently, California's newly-advanced contention is wholly unsupported and unsupportable.

Respondents do not propose physically to segregate the restricted-use gas in the commingled stream by means of their contracts. There is no necessity to do so. However, Respondents will keep their restricted-use transactions separate, for determination of jurisdiction turns upon whether essentially separate sales are identifiable. *United States* v. *P.U.C. of California*, 345 U.S. 295, 317-318 (1953). Indeed, under the Natural Gas Act, there is no such thing as "jurisdictional gas." [See, Section 1(b), Section 7(c)]

II.

PETITIONERS' POSITION IS UNSUPPORTABLE.

Each of the Petitioners bases its argument for Commission jurisdiction on a contention that, because of commingling, some of the molecules of gas delivered under the restricted-use contracts will be in the commingled stream when it reaches the California border (F.P.C. Br. pp. 12-13; Cal. Br. p. 20; S. Cal. Br. p. 5). Referring to an excerpt from this Court's opinion in *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515 (1945), they claim that Commission jurisdiction under the Act extends to all sales into the commingled stream.

Significantly, Petitioners' reliance upon one sentence taken out of context from the *Connecticut* case is wholly misplaced. Instead of holding that the Federal Power Act gives the Commission jurisdiction based upon an "engineering and scientific test," the opinion makes clear that Congress did not adopt such a test. The language from the *Connecticut* case relied upon by Petitioners is placed in proper context in the more complete quotation below, the emphasized portion

being the language relied upon by Petitioners (324 U.S. at 529):

> "This bill came before Congress as prepared by the staff of the Commission, couched largely in the technical language of the electric art. *Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental test.* Technology of the business is such that if any part of the supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility. Every facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power. By this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state."

From the remainder of the opinion it is clear that what the Court was saying in the *Connecticut* case was that the original draft of the bill sent to Congress intended to give the Commission jurisdiction to follow the flow of electricity, an engineering and scientific test. *But Congress did not accept that version* and attached legal standards of limitation (*Id.*, at 531)[13] One of the limitations which was included in the Act as finally passed and the significant one here, is that Commission jurisdiction over sales is limited to one

[13] The Court in the recent *Amerada* case effectively disposed of this same argument that the *Connecticut* case stood for the proposition that Commission jurisdiction is based upon an engineering test, without legal limitations. Thus, the Court noted, as we have above, that the Commission's argument was taken out of context and that when the *Connecticut* opinion is read in its entirety it is clear that the test which the Commission is now urging was considered but rejected by Congress. *Amerada Petroleum Corp.* v. *F.P.C.*, 334 F. 2d 404, 409-410, note 4 (1964).

type of sale—a sale in interstate commerce for resale. Nowhere in the Act is the Commission given jurisdiction over gas, as such. It is the sale which is subject of regulation. This is fundamental to the separability of transactions test announced in the *California* case where this Court noted that when commingled energy is involved determination of jurisdiction "would turn, of course, on whether an essentially *separate transaction* covering the power directly consumed by the purchaser is identifiable." (345 U.S. at 317-318; emphasis supplied.)

Likewise, reliance upon *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414 (1952) and *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205 (1964) is misplaced in the context of this case. Both of those cases involved sale for resale of energy some of which was produced locally and some of which had out-of-state origin. This Court held in both cases that the sale for resale, since it included energy which had been produced in another state, was subject to Commission jurisdiction. Clearly, there was no assertion of jurisdiction over a separate transaction involving only the sale of energy for a restricted or nonjurisdictional purpose. On the contrary, the lack of such separability resulted in Commission jurisdiction over the entire amount sold under the single contract regardless of its ultimate use.[14]

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[14] An additional distinction between the *Penn. Water* case and the facts of this case should be noted. In *Penn. Water* electricity was produced at several points on an integrated system both in Pennsylvania and Maryland. Depending upon the needs of the system energy produced at the several sources could be switched back and forth instantaneously. Out-of-state energy could thus be present at any time at any point on the integrated electric system. In contrast, gas produced in Texas moves in El Paso's

Similarly, other cases cited by Petitioners are not pertinent for they do not involve either proportional separation of volumes or the separability of transactions test. Thus, *Deep South Oil Co.* v. *F.P.C.*, 247 F.2d 882 (5th Cir. 1957) does not reach the issues involved here for the decision did not touch upon the validity of proportional separation by volume and separability of transactions simply because those issues were not involved.

The cases dealing with the scope of interstate commerce such as *Jersey Central Power & Light Co.* v. *F.P.C.*, 319 U.S. 61 (1943); *Hartford Electric Light Co.* v. *F.P.C.*, 131 F.2d 953 (2d Cir. 1942), *cert.* denied, 319 U.S. 741 (1943); and *Interstate Natural Gas Co.* v. *F.P.C.*, 331 U.S. 682 (1947) are likewise irrelevant. None deal with the issue here presented whether the parties may, through separate nonjurisdictional transactions and by means of a carefully monitored system operation, effect a proportional separation from the commingled stream.

Neither are the several cases dealing with an expressed intention contrary to fact of any assistance to Petitioners' position. Here Lo-Vaca and Houston intend to make restricted-use sales. They do not intend sales for resale in interstate commerce. Indeed, Houston's producers may cancel their supply contracts if Houston makes such a sale. Here, also, because of the proportional separation effected by system operations in accordance with the terms of the contracts,

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system in a constant "downstream" direction to points of consumption. The record shows that no out-of-state gas will be present at any time in El Paso's facilities which transport and consume Houston's gas (R. 149, 160).

the intention of Lo-Vaca and Houston conforms to the fact.

Furthermore, the cases such as *Baltimore & O.S. W.R. Co.* v. *Settle*, 260 U.S. 166 (1922), show that intention may indeed be a factor in determining the nature of a transaction. What these cases hold is that the parties real intention is significant, and any expressed intention at variance with the real intent is not controlling. Thus, in *Baltimore & O.S.W.R. Co.* v. *Settle*, the real intention of the parties was to make a through shipment in interstate commerce. Consequently, interstate rates were held to apply to the entire shipment to the point of final destination. Similarly, in *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390 (1930) the real intention of Superior was to engage in intrastate commerce. Its contractual agreement did not change this intention (*id.* at 394-395).

By contrast, the real intention of Lo-Vaca and Houston here is to make restricted-use sales. Lo-Vaca and Houston have no intention whatever of making sales for resale in interstate commerce. Indeed, as noted above, Houston's supply contracts rule out any such possibility (R. 109-111, 459).

III.

THERE IS NO REGULATORY GAP.

Petitioners contend that the result reached by the Court below, even though consistent with other decisions, will result in a regulatory gap not intended by the Natural Gas Act (F.P.C. Br. pp. 22-27; Cal. Br. pp. 31-33). To reach their conclusion, Petitioners find it necessary to depart from the unbroken line of precedents which has defined the so-called regulatory

gap in terms of the limits of state power over transactions in interstate commerce and federal regulation at the time of the passage of the Natural Gas Act. *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507 at 517. Petitioners now ask this Court to scrap the test of the Act and substitute a new test to be applied on a case by case basis in which the Commission and the courts would balance national and local interest in a direct sale in interstate commerce or even a sale in intrastate commerce to a pipeline operating in interstate commerce (F.P.C. Br. p. 24; Cal. Br. p. 31). In short, Petitioners would have Commission power over sales vary depending upon the "interest" of the states to regulate transactions which are admittedly within their *power* to regulate (F.P.C. Br. p. 24). But this Court, as recently as last term, expressly renounced any such test of federal jurisdiction. *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964).

The Commission advances a novel theory that it should have the power to regulate the Lo-Vaca and Houston sales because "no State *could be expected* to regulate a sale to an interstate pipeline for ostensible use in the latter's own operations." (F.P.C. Br. 24 emphasis supplied). And it continues, the producing state (here, Texas), "*though perhaps having the power*, would have *little interest* in regulating an item of pipeline cost which would be reflected chiefly in rates paid by customers in other States." (F.P.C. Br. p. 24.)

Notably, the Commission does not base its argument, as indeed it cannot, upon a lack of state power to regulate the sales to El Paso but upon what it assumes to be a lack of interest on the part of Texas in regula-

tory sales.[15] The very manner in which the Commission frames the issue assumes that sales to El Paso for its own use are direct sales (F.P.C. Br. 24). But Section 1(b) limits Commission authority to sales for resale in interstate commerce.

Nonetheless, the Petitioners urge the Court to expand Commission jurisdiction to comprehend sales which are not sales in interstate commerce for resale. The Commission frankly admits existence of state power but contends that the state having the power to regulate the transaction "would have little interest" in doing so. Thus, the Commission bases its assertion of jurisdiction here not upon the statutory distinction between sales in interstate commerce for resale, on the one hand, and all other types of the sales, on the other, but upon its conclusion that the State of Texas has no inclination to regulate.

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[15] It is well established that under Texas law the State of Texas has the power both to fix city rates and to regulate industrial sales. *State* v. *Public Service Corporation of Texas*, 88 S.W. 2d 627 (1935), Tex. Civ. App. error refused; *Railroad Commission* v. *Houston Natural Gas Corp.*, 289 S.W. 2d 559 (1956); *United Gas Corp.* v. *Shepherd Laundries Co.*, 189 S.W. 2d 485 (1945). Vernon's Texas Annotated Statutes 6056-6066. Moreover, the Commission has recently found, in another context, that with regard to Lo-Vaca's existing operations: "(*United Gas Pipe Line Co.* v. *Coastal States Gas Producing Co.*, Docket No. CP64-75, Opinion No. 419, issued February 10, 1964, mimeo. ed., p. 4):

> "* * * [A] certificate of the Texas Railroad Commission has been filed with us in accordance with the provisions of Section 1(c) of the Act to the effect that the rates, services and facilities of Lo-Vaca involved in its sales of natural gas for resale in Texas are subject to its [The Texas Railroad Commission's] regulatory jurisdiction and it is exercising such jurisdiction.'"

Significantly, however, the Commission took no evidence on the issue of national versus local interest and its argument on this point is based only on surmise.

Nowhere in the Act, its legislative history, or Court decisions is there any support for this position. Indeed, exactly the opposite conclusion is commanded. The decision by this Court in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205 (1964) is the most recent of many decisions which reject the contention that Commission authority is to be determined in each case based upon an evaluation of state versus national concern. See, *e.g.*, *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507 (1947); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498 (1942).

Only a brief resume of applicable law will demonstrate the fallacy of the Commission's position. For the "regulatory gap", which was closed by the Natural Gas Act, extended only to those transactions in interstate commerce which the States were powerless to regulate. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498 at 507.

Preliminarily, it should be noted the extent of the Commission's authority to regulate transactions in interstate commerce is dependent upon the "gap" in regulation as it existed at the time the Natural Gas Act became law. (*Id.*, at 504). "But prior constitutional decisions, not what [the Courts] have since decided or would decide today, form the measure of the gap which Congress intended to close by this Act." *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 472 (1950). Furthermore, the line between state power, on the one hand, and Commission authority, on the other, is sharp and clean allowing for no gray areas to be determined on the basis of state "interest" in regulation. *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507 at 517.

Prior to the passage of the Natural Gas Act this Court had clearly defined the areas of interstate commerce where states could act and the areas where they were forbidden to act. Thus, the line was drawn between direct sales "of whatever sort" for consumption by the purchaser which states had the power to regulate and sales for resale in interstate commerce which were beyond the reach of state power. *Id.*, at 514-515; *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, at 214-215.

As early as *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920), this Court held that states have power to regulate sales in interstate commerce if such sales are made for direct consumption by the purchaser. On the other hand, *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); and *P.U.C. of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) made it clear that sales for resale in interstate commerce were beyond the scope of state power. In the absence of any federal legislation to occupy the field where states were powerless to act, there existed a gap in regulation.

Thus, the Natural Gas Act was drafted with precision to grant authority to the Commission to regulate only that portion of interstate commerce which had been held to be beyond state power at time of passage of Natural Gas Act. The legislative history of the Natural Gas Act contains numerous references making plain the intent of Congress.[16]

If any doubt lingered as to the extent of the regulatory gap, it was definitively settled by this Court last

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[16] See, *e.g.*, H. Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-2 (1936); H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-2 (1937); Sen. Rep. No. 1162, 75th Cong. 1st Sess. pp. 1-2 (1937).

term in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205 (1964). This Court there noted that "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction making unnecessary such case-by-case analysis." (*Id.*, pp. 215-216)[17] This Court reached this conclusion after thorough examination of the case law both prior and subsequent to passage of the Federal Power Act and Natural Gas Act. It noted that the Congress "rather than adopting this flexible approach. . . ." of weighing local and national interest in each sale, had adopted a test developed prior to passage of the Act which had denied state power to regulate sales for resale in interstate commerce but permitted state regulation over direct sales. The direct sale—sale-for-resale distinction written into the Natural Gas Act automatically weighs national and local concern in the manner intended by the Natural Gas Act. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506-508 (1942).

The decision in the *Southern California Edison* case is, of course, entirely consistent with *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507 (1947) where the Court held that the line of the statute was "clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. *No exceptions were made in either category for particular uses, quantities or otherwise.*" (*Id.*, at 517; emphasis supplied.)

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[17] Interestingly, the Commission itself argued in *F.P.C.* v. *Southern California Edison Co.* that a sale for resale in interstate commerce was subject to its regulatory jurisdiction, *per se*, and there was no necessity of weighing the national versus local concern involved in the particular sale (see Brief for the Federal Power Commission, *F.P.C.* v. *Southern California Edison Co.*, No. 71, October Term, 1963).

Petitioners seek to becloud the precise issue with a contention that if the Commission is not here given authority to regulate the Lo-Vaca and Houston sales the prices charged will affect El Paso's costs which, in turn, since El Paso is an interstate pipeline company making sales for resale in interstate commerce, may affect ultimate consumers (F.P.C. Br. p. 25; Cal. Br. p. 31; S. Cal. Co. Br. p. 8). The short answer, of course, is that Commission jurisdiction does not turn upon the effect of a transaction upon an interstate pipeline company. Jurisdiction is dependent upon the "bright line" between sales for resale in interstate commerce and direct sales whether in intrastate or in interstate commerce.

Furthermore, the cost of the restricted-use gas would be a cost of fuel just as if Lo-Vaca and Houston were to sell fuel oil to El Paso for use in its compressors. Obviously, the cost of fuel oil would affect El Paso's cost of service. But this would not give rise to Commission jurisdiction over the sale of fuel oil. Simply because the fuel happens to be gas instead of oil changes nothing.

The Commission, in its brief raises a spectre of dire results which it argues might occur if it is not given jurisdiction over the Lo-Vaca and Houston sales (F.P.C. Br. 23-24). Since the limits of Commission jurisdiction are fixed by the Natural Gas Act, the Commission's argument as to the effect of nonjurisdictional transactions is, of course, irrelevant. The Commission does not gain jurisdiction based upon the effect of a nonjurisdictional transaction upon interstate commerce. The *Shreveport* doctrine,[18] which measures the

[18] *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914).

scope of federal jurisdiction under the Commerce Clause[19] based upon a determination whether a transaction affects interstate commerce, forms no part of the foundation for Commission authority under the Natural Gas Act.

Neither can the Lo-Vaca and Houston sales have any effect upon the Commission's area price policy relating to producer rates. Lo-Vaca and Houston are not producers and their sales would not be considered as such, *cf., Ben Bolt Gathering Co.* v. *F.P.C.*, 323 F.2d 610 (5th Cir. 1963).

On the other hand it is apparent that the Commission has adequate power with respect to the operations here involved to protect the public interest in the manner envisioned by the Natural Gas Act. At many points the Commission can exert regulatory control. Thus, all the producer sales to Lo-Vaca will be sales for resale in interstate commerce and therefore subject to certification by the Commission under Section 7. Furthermore, the construction and operation of the Lo-Vaca facilities used to bring the restricted-use gas to the Coquat Station must be certificated by the Commission. In this sense, Lo-Vaca would be in a position somewhat analogous to Transcontinental Gas Pipe Line Corporation which sought authorization to transport gas from Texas to New York for Consolidated Edison Company. See, *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961).[20]

[19] United States Constitution, Article I, Section 8, Clause 3.

[20] In the *Transcontinental* case, however, the producer sales to Consolidated Edison, being direct sales in interstate commerce for the purchaser's own consumption, were not subject to regulation by the Commission. (365 U.S. 1, at 4).

Moreover, in accordance with Commission practice Lo-Vaca will present a feasibility study in support of its application for construction and operation of its facilities and in support of its unrestricted-use sale which will justify the spread between the producers' approved prices and the sales price to El Paso under the jurisdictional sale. It will also demonstrate that its transportation of restricted-use gas is in the public interest.

The Commission can exercise its authority at an additional stage—certification in Docket No. CP60-101 of the 227 miles of pipeline from Three Rivers to Sonora to be constructed by El Paso Gas Supply Company. Other facilities, such as those involved in El Paso's Docket No. G-18616, would also be subject to Commission scrutiny.

Clearly, the Commission has the authority now to protect the public interest in the manner proposed by the Natural Gas Act. The Commission's authority over sales should not be broadened to include the Lo-Vaca and Houston restricted-use sales.

CONCLUSION

For the foregoing reasons, Respondents request that the decision of the Court below be affirmed.

Respectfully submitted,

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APPENDIX

NATURAL GAS ACT

[PUBLIC—No. 688—75TH CONGRESS]
[CHAPTER 556—3D SESSION]
[H. R. 6586]

AN ACT

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * * * * *

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

* * * * * * * * * *

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force

with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall

be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

* * * * * * * * * *

Transportation Rate Schedules

There is set forth below a description of some of the more significant transportation rate schedules on file with the Federal Power Commission providing for proportional separation by volume.

Pipeline Company.	Transportation Service Provided
1. El Paso Natural Gas Company	a) *Service*—Firm transportation up to 525,000 Mcf per day along El Paso's Dumas Line from Yoakum County, to Moore County, Texas b) *Customer*—Northern Natural Gas Company c) *Rate Schedule*—Z-1
2. Florida Gas Transmission Company	a) *Service*—Firm transportation of an aggregate average daily quantity of 50,000 Mcf, average over each month, and up to a maximum daily quantity of 55,000 Mcf of any day; from points in State of Louisiana to various points in Florida b) *Customer*—Florida Power Corporation c) *Rate Schedule*—T-1
	a) *Service*—Firm transportation of an aggregate average daily quantity of 100,000 Mcf, averaged over each month, and up to a maximum daily quantity of 110,000 Mcf on any day; from various points in the State of Texas to various points in Florida b) *Customer*—Florida Power & Light Company c) *Rate Schedule*—T-2
3. Northern Natural Gas Company	a) *Service*—Firm transportation of daily volumes up to 211,000 Mcf but not less than daily average of 190,000 Mcf for calendar year, from Northern's Spraberry Compressor Station in Midland County, Texas to El Paso's Plains Compressor Station in Yoakum County, Texas. If excess gas is available and requested by El Paso, Northern to use best efforts to transport up to aggregate daily volumes of 225,000 Mcf.

Pipeline Company.	Transportation Service Provided
	b) *Customer*—El Paso Natural Gas Company c) *Rate Schedule*—T-1
4. Tennessee Gas Transmission Company	a) *Service*—Firm transportation of the daily contract quantities from Sheridan Field, Colorado County, Texas to Pennsylvania and New York b) *Customers*—Iroquois Gas Corp. and Affiliates—48,752 Mcf c) *Rate Schedule*—T-1
	a) *Service*—Firm transportation of daily contract quantities from Texas RR Dist. 2, 3, & 4, and Cameron Parish, Louisiana, to Erie County, New York b) *Customer*—Iroquois Gas Corp.—24,376 Mcf c) *Rate Schedule*—T-2
	a) *Service*—Firm transportation of daily contract quantities from Nueces County, Texas, to West Virginia b) *Customer*—United Fuel Gas Co.—61,148 Mcf c) *Rate Schedule*—T-3
	a) *Service*—Firm transportation of daily contract quantities from Nueces County, Texas (RR Dist. 4) to eastern Ohio and western Pennsylvania b) *Customer*—Manufacturers Light & Heat Co.—50,000 Mcf c) *Rate Schedule*—T-4
	a) *Service*—Firm transportation during six-month period from November 1 through April 30 of each year up to a maximum contract demand quantity of 34,314 Mcf per day from point of interconnection between Tennessee's and United Fuel Gas Company's pipelines to connection with Manufacturers Light & Heat Co. near Unionville, Beaver County, Pennsylvania b) *Customer—Manufacturers* Light & Heat Company

Pipeline Company.	Transportation Service Provided
	c) *Rate Schedule*—T-5
	a) *Service*—Firm transportation for four-year period of daily volumes requested by United Gas Pipe Line Co., Iberia Parish, Louisiana, to Jefferson Davis Parish, Louisiana b) *Customer*—United Gas Pipe Line Company c) *Rate Schedule*—T-6
5. Texas Eastern Transmission Corporation	a) *Service*—Firm transportation up to a maximum daily quantity of 100,000 Mcf per day from Lebanon, Ohio to various points of delivery to Hope Natural Gas Co. and its affiliates in Ohio, West Virginia and Pennsylvania b) *Customer*—Hope Natural Gas Company c) *Rate Schedule*—X-43
6. Texas Gas Transmission Corporation	a) *Service*—Firm transportation of volumes purchased by American Louisiana from Pan American Petroleum Corporation in south Louisiana fields to interconnecting points in Cameron and Acadia Parishes, Louisiana b) *Customer*—American Louisiana Pipe Line Company c) *Rate Schedule*—X-6
	a) *Service*—Firm transportation on a firm basis, up to a contract demand of 100,000 Mcf per day, from fields in South Louisiana to a point near Lebanon, Ohio b) *Customer*—Hope Natural Gas Company c) *Rate Schedule*—X-21
	a) *Service*—High-priority interruptible transportation of up to 6,000 Mcf per day from Claiborne Gasoline Plant in Claiborne Parish, Louisiana, to Gulf's Cleves refinery in Hamilton County, Ohio. "High-priority" service is considered firm service but may be interrupted when

Pipeline Company	Transportation Service Provided
	necessary, upon not less than 12 hours prior notice to Gulf. b) *Customer*—Gulf Oil Corporation c) *Rate Schedule*—X-29.
	a) *Service*—Transportation from Terrebonne Parish, Louisiana, to Texaco's refinery at Lawrenceville, Illinois b) *Customer*—Texaco, Inc. c) *Rate Schedule*—X-32
7. Transcontinental Gas Pipe Line Corporation	a) *Service*—Firm transportation of contract transportation demand of 29,000 Mcf per day through November 15, 1975, and 9,000 Mcf per day thereafter, from Texas Gulf Coast area to Marcus Hook, Pennsylvania b) *Customer*—Sun Oil Company c) *Rate Schedule*—X-11
	a) *Service*—Interruptible transportation of up to 60,000 Mcf on any day from Texas Gulf Coast area to Marcus Hook, Pennsylvania b) *Customer*—Sun Oil Company c) *Rate Schedule*—X-1
	a) *Service*—Transportation of up to 25,000 Mcf of firm pipeline gas, and up to 30,000 Mcf of storage gas per day from point of interconnection on Tennessee's Hebron-Greenwich line for delivery to Public Service Electric and Gas Company at points in New Jersey b) *Customer*—Tennessee Gas Transmission Company c) *Rate Schedule*—X-15
8. United Gas Pipe Line Company	a) *Service*—Firm transportation up to maximum daily quantities of 121,300 Mcf for Tennessee Gas Transmission Company and 55,460 Mcf for Southern Natural Gas Co. from Carthage Field in Texas to points near Monroe, Louisiana b) *Customers*—Tennessee Gas Transmission Company and Southern Natural Gas Company c) *Rate Schedules*—T-1 and T-3

Office-Supreme Court, U.S.
FILED
NOV 12 1964
JOHN F. DAVIS, CLERK

No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1964

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Reply Brief for Petitioners

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November 10, 1964

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Reply Brief for Petitioners

In accordance with Rule 41 (3) of the Revised Rules of the Supreme Court of the United States, the petitioners, People of the State of California and Public Utilities Commission of the State of California (California), submit this brief in reply to the joint brief for respondents Lo-Vaca Gathering Company (Lo-Vaca), Houston Pipe Line Company (Houston) and El Paso Natural Gas Compay (El Paso), and in reply to the brief of the Independent Natural Gas Association of America (Association), *amicus curiae*.

ARGUMENT

I. Respondents' Theory of Proportional Separation Is Inconsistent with Physical Fact, Contract Requirements and Effective Regulation

In order for Federal Power Commission (Commission) jurisdiction to attach to the Lo-Vaca and Houston sales it must be recognized that these sales are sales in interstate commerce for resale. Considering not what the contracting parties say about the sales but considering what they actually will do with the gas, the Lo-Vaca and Houston gas will be sold in interstate commerce for resale. This was conceded by Houston's president and El Paso's chief pipeline engineer. (R. 56-57, 66). Consequently, from the point of view of physical fact, the sales are without question subject to the Commission's jurisdiction.

The respondents, while conceding that their gas would flow to interstate markets for eventual resale, would have this Court rest a decision of nonjurisdiction on mere contractual stipulations which purport to "restrict" the Lo-Vaca gas to El Paso's facilities outside of Texas, and to "restrict" the Houston gas to facilities within Texas.

The so-called restrictions do not restrict the physical flow of the gas, or even compel El Paso to handle the Lo-Vaca and Houston supplies differently from other gas within the El Paso system. In fact, the contractual stipulations are not restrictive at all but rather they place an affirmative duty upon El Paso to label some gas consumed outside of Texas "Lo-Vaca gas," to label some gas consumed inside of Texas "Houston gas," and to assure the volumes so consumed at least equal the volumes purchased from Lo-Vaca and Houston. (Joint Br., pp. 35-37).

El Paso is required to pretend that Lo-Vaca and Houston gas is being burned as fuel in certain places, and to pretend that none of the gas is being resold in interstate commerce. But such pretension is a really broad assertion by El Paso of a power to decide whose gas is where at what time in what part of its system

This case involves, then, the power of El Paso to attach, whenever and wherever convenient, the label of a particular seller to a particular load of gas within its system. Respondents would justify this power on the basis of the commercial practice, often related to grain elevators, of proportional separation of fungible commodities by volume. (Joint Br., pp. 32-35). Essentially, respondents argue that any gas tapped from El Paso's system would be equivalent to the Lo-Vaca and Houston gas.

Viewing the matter within the framework of the respondents' own contracts, this position makes little sense. The gas is sold to El Paso by Lo-Vaca and Houston subject to specific quality standards and, as is the industry custom, quality and price are directly rela[1] See *The Pure Oil Co. v. Federal Power Commission*, 299 F.2d 370, 373 (7th Cir. 1962). Yet once the gas is turned over to El Paso for system use, at set prices, there is no assurance that whatever gas El Paso would use for the particular purposes agreed upon would be of the same quality as the Lo-Vaca and Houston gas, or would elicit the same prices as Lo-Vaca and Houston gas in the pipeline market.

The pointlessness of respondents' argument can be demonstrated by assuming that El Paso were not buying the Lo-Vaca and Houston gas but were only transporting the gas within its system as a service to the companies. We may be certain that Lo-Vaca and Houston would demand the return of equivalent gas—in quality as well as volume—at the end of the journey, or would demand at least some price adjustment to reflect any changes.

If Lo-Vaca and Houston were only selling volumes of gas, to be measured when sold to El Paso and to be measured when utilized by El Paso, then all the language in their contracts relating to quality standards would be surplusage. California submits that it is a meaningless gesture to provide quality standards at the points of sale and yet not provide those standards at the points where the gas is theoretically to be consumed. This demonstrates the sheer fantasy of the "restricted-use" stipulations.

Viewing the matter from a regulatory standpoint, acceptance of respondents' theory would produce ridiculous regulatory results. Under this theory gas transferred to El Paso through the unregulated Lo-Vaca and Houston sales would displace gas received by El Paso under regulated sales. Assuming Lo-Vaca and Houston gas to be low quality gas sold at a premium price, El Paso would be in a position to withdraw from its system high quality gas sold at regulated prices and call this "Lo-Vaca gas" and "Houston gas." El Paso's mainstream, destined for resale in interstate commerce, would retain the low quality gas which would, under respondents' theory of proportional separation by volume, represent the gas sold under regulation. The producer who sells his gas in interstate commerce for resale at a regulated price would certainly have cause to complain if the pipeline, after receiving his gas, were able to label it the gas of another seller who sold gas at an unregulated price.

The "restricted-use" stipulations must be recognized as devices designed to enable sellers to sell their gas in interstate commerce for resale and at the same time escape the regulatory jurisdiction which attaches to such sales.

Respondents argue that the only alternative to the "restricted-use" stipulation is the construction of separate facilities to transport nonjurisdictional gas. This is hardly the only alternative. The obvious other alternative would be a jurisdictional sale such as Lo-Vaca proposes under its May contract.*

In a few cases jurisdictional gas and nonjurisdictional gas have been transported in common facilities. See *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957), and *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954), cert. denied 349 U.S. 920 (1955). In such instances, however, the physical flow of gas must be traced from the point of sale

*Lo-Vaca is, of course, prepared to consummate its sale to El Paso under the March contract even if it is ultimately determined to be subject to the Commission's jurisdiction." (R. 22-23)

to the point of nonjurisdictional use. This factor is completely absent in respondents' transactions. Its importance will be discussed next.

II. Respondents' Scheme of Proportional Separation Is Novel and Unprecedented

Proportional separation by volume of fungible commodities is applied in some cases. In the early case of *Harrington v. United States*, 78 U.S. (11 Wall.) 356, 368-369 (1871), the Court approved a proportional separation by volume of distilled spirits. In *The Intermingled Cotton Cases*, 92 U.S. 651 (1876), the proceeds from the sale of a large, commingled quantity of cotton were divided in proportion to the aliquot interest of each owner in the cotton. These cases, as well as cases cited by respondents involving grain, sugar and coal (Joint Br., p. 34), concerned commodities of like quality, commingled in a fungible mass, where proportional separation was possible on the basis of the interest of each joint owner in the commingled mass. The practice certainly is not an issue in this proceeding.

In *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957), and *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1955), cert. denied 349 U.S. 920 (1955), a proportional separation by volume was permitted because in each case there was a single, fungible supply of natural gas which was realistically divisible into jurisdictional and nonjurisdictional parts.

In *North Dakota* a single supply of gas from the tailgate of a plant in North Dakota was sold and delivered to an interstate pipeline company. The supply was transported in one line with no other gas. This supply of tailgate gas was partly consumed in North Dakota and the remainder was resold outside of North Dakota. The sale representing the tailgate gas consumed in North Dakota was nonjurisdictional because it was not a sale in interstate commerce; the sale representing the tailgate gas resold

in interstate commerce was jurisdictional. In *North Dakota* the nonjurisdictional gas was the same type of gas as the jurisdictional gas because each was a part of a common supply. This common supply could be traced back to the source—the tailgate of the plant where the sales were made.

The *North Dakota* case should be contrasted with the Houston sale. Unlike nonjurisdictional gas in *North Dakota*, which was a separate proportion of the gas sold at the plant, the purported nonjurisdictional gas which would be consumed in Texas under the Houston transaction would not even be traceable to the gas sold at Coquat Station. Unlike the nonjurisdictional gas in *North Dakota*, which was the same type of gas as the gas sold at the plant, the gas sold by Houston at Coquat Station need not even resemble the gas ultimately used by El Paso for nonjurisdictional purposes. Unlike the nonjurisdictional gas in *North Dakota*, which was never commingled with gas from a source other than the plant, the so-called nonjurisdictional gas which would be utilized by El Paso within Texas would be a composite of gases from numerous sources.

California submits that the *North Dakota* case presented a set of facts which made proportional separation by volumes meaningful. On the other hand, the Houston transaction, which would provide no links between the gas sold and the gas utilized in intrastate commerce, presents a set of facts which would undermine the practice of proportional separation.

City of Hastings involved sales of gas by an interstate pipeline company to a city. A single supply of gas, transported in interstate commerce, was delivered to the city. A proportion of this supply was put to a direct industrial use and, therefore, did not involve a sale for resale; the remainder of this supply was resold and, consequently, involved a jurisdictional sale. It is important to emphasis that in *City of Hastings*, as in *North Dakota*, the nonjurisdictional gas was a proportional part of a single supply purchased from the seller.

The *City of Hastings* case should be contrasted with the Lo-Vaca proposal. *City of Hastings* has no application to the Lo-Vaca sale for same reasons that *North Dakota* has no application to the Houston sale. In *City of Hastings* the nonjurisdictional gas was a proportional part of the single supply delivered to the city; the nonjurisdictional gas was identical to the other gas making up the city's supply; and the city's supply was never commingled with gas from another source. On the other hand, the gas which would be utilized by El Paso in its own facilities outside of Texas would not even be traceable to the gas sold at Coquat Station, need not even resemble the gas sold by Lo-Vaca, and would be derived from an unlimited number of sources. Again, while proportional separation by volume was realistic in the *City of Hastings* case, application of the practice to the facts of the Lo-Vaca case would be stretching the concept beyond all practical limits.

The factual distinctions between *North Dakota* and *City of Hastings*, on one hand, and the Houston and Lo-Vaca sales, on the other hand, are material. Did the fact that the pipeline company in *North Dakota* sold gas in intrastate commerce give such pipeline company power to place the label of any one of its many suppliers on such gas and thereby remove the sale by that supplier from the Commission's jurisdiction? Did the fact that the city in *City of Hastings* used some of the gas it purchased for an industrial use alter the fact that the gas came from one pipeline company and no other? The answers are obviously in the negative.

In *North Dakota* and *City of Hastings* the nonjurisdictional use of the gas was a function of a separate, proportional part of the total supply of gas sold. The same was true in *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), also relied upon by respondents, where the electric energy sold for direct consumption, if sold under a separate transaction, would

have been directly traceable to the total supply of energy originally sold to the purchaser.*

A single supply of natural gas can be the subject of both regulated and unregulated sales if the single supply is divisible into parts of the same quality, and these parts can be separated as to use. Physical identification and tracing of molecules, in such a case, would be meaningless because the flow from the point where the gas is sold and delivered would always be traceable to the regulated or the unregulated utilization.

Respondents attempt to draw a parallel between their sales and transportation agreements under which a pipeline company transports someone else's gas for a service fee. In some instances gas so transported may be commingled within the pipeline with gas to be resold in interstate commerce. Such cases have no relevance to the facts involved in the Lo-Vaca and Houston transactions.

The Lo-Vaca and Houston gas is *sold* to El Paso; it is El Paso's property. On the other hand, under a transportation agreement there is no sale to be regulated. While it is possible that under a transportation agreement the owner of the gas may not have the identical molecules returned to him upon completion of the transportation, he still may provide in his agreement that the gas returned to him comes from the same physical flow, that it be gas of the same quality as that originally turned over to the transporter, and that there be an adjustment for any change in quality. The Lo-Vaca and Houston gas is, by contrast, sold to El Paso without a condition, or even a bare assurance that the gas consumed in nonjurisdiction uses will have a resemblance or a relationship to the gas sold.

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*Respondents further rely upon *Amerada Petroleum Corp. v. Federal Power Commission*, 334 F.2d 404 (8th Cir. 1964), a case decided subsequent to the decision of the court below and based on the rationale of that decision. The matter is pending before this Court in *Federal Power Commission v. Amerada Petroleum Corp.*, No. 585 (Oct. Term 1964), on the Commission's petition for a writ of certiorari.

Respondents fail to cite a single example where the Commission has declined to assert jurisdiction over transactions such as they propose. This is understandable because respondents' theory of proportional separation by volume is novel and unprecedented. It is not motivated by business convenience or necessity. It is not motivated by public convenience and necessity. It is motivated by a desire to escape regulation which would otherwise attach to the sales under the physical facts.

III. Respondents' Sales Would Open an Attractive Gap in an Area Now Subject to the Commission's Regulatory Authority

Respondents' attempt to characterize the Commission's effort to regulate their sales as an assertion of jurisdiction in a new area. This characterization evades the real question which is whether or not the respondents' sales come within the Commission's undisputed authority to regulate sales in interstate commerce for resale. There is no question here of new authority but rather a question on the exercise of the Commission's existing authority.

The gap that will be created if the Lo-Vaca and Houston sales are allowed to go unregulated will be a gap within the category of "sales in interstate for resale". With this gap Lo-Vaca, Houston and those similarly situated will be able to sell their gas to pipeline companies for resale in interstate commerce and, by the magic of a few additional words in the contracts, reap the benefits of an unregulated sale. The seller's only obligation is to say the words; the buyer's only obligation is to imagine that the gas bought is burned in certain plants, camps or boilers.

Contractually restricted sales, of the type involved in the case at bar, are repugnant to the comprehensive scheme of regulation envisioned by Congress in passing the Natural Gas Act. There is no question but that the interests of primary concern here are national rather than local; there is no question but that respondents have been motivated by a desire to escape federal regulation.

This proceeding, then, does not involve an extension of regulation but the power of natural gas companies to exclude themselves from regulation by their own devices.

This Court must decide the case in a manner which will best promote a congressional policy directed toward effective, comprehensive regulation in the public interest. Such congressional policy, embodied in the Natural Gas Act, does not countenance "attractive gaps" in the regulatory scheme created by the Act.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in its Brief for Petitioners, California urges that the judgment of the Court of Appeals be reversed with directions to affirm the orders of the Commission.

Respectfully submitted,

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November 10, 1964